Supreme Court, U.S.
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79 No. 07-920

In The
Supreme Court of the United States

THOMAS BURRUSS, *et al.*,
Petitioners,

v.

JOHN EVANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MARYLAND COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether a property owner whose property rights are substantially affected by the issuance of a building permit for construction on an adjoining property owner's land has a due process right to notice of the issuance of the building permit.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are Thomas Burruss, Judith Burruss, Alan Gaunoux, John Evans, and Carol Evans. Montgomery County, Maryland participated in the proceedings before the Board of Appeals for Montgomery County, Maryland and in the Circuit Court for Montgomery County, Maryland, and filed a motion to participate as *amicus curaie*, which was granted by the Court of Appeals of Maryland on May 21, 2007.

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JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 12, 2007. A motion for reconsideration was filed on October 18, 2007, and denied on November 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

On February 20, 2004, Respondent Mr. John Evans obtained a building permit from the Montgomery County Department of Permitting Services ("DPS") for the construction of four 190 foot amateur or "ham" radio towers on the property

located at 15110 Sugarland Road, Poolesville, Montgomery County, Maryland. A revised permit for the towers was issued to Respondent by DPS on June 23, 2004, and Respondent began the construction of the towers on August 5, 2004. Respondent was not required to provide any notice regarding the issuance of the building permits, and no such notice was provided.

Petitioners Thomas Burruss, Judith Burruss, and Alan Ganoux, who owned property adjoining the Evanses property,[1] filed two administrative appeals with the Board of Appeals for Montgomery County, Maryland (the "Board"), challenging the issuance of the building permits. In the appeals, Petitioners asserted that the building permits were unlawfully issued because under the Montgomery County Zoning Ordinance, as it existed at the time that the appeals were noted, radio towers were authorized by special exception only, and no special exception was granted for the radio towers. In addition, Petitioners contend that Respondent should have been required to complete the subdivision process under the Montgomery County Code prior to the issuance of the permits.

Case No. A-6020, filed on August 30, 2004, was an appeal of the issuance of building permit numbers 330255 (issued February 20, 2004) and

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[1] Petitioners Thomas Burruss and Judith Burruss moved from their residence in or around October of 2006, and are no longer adjoining property owners. Petitioner Alan Gaunoux is still an adjoining property owner.

344132 (issued June 23, 2004). Respondents filed a motion to dismiss that appeal on or about September 22, 2004, and Montgomery County, Maryland (the "County") filed a motion to dismiss that appeal on or about September 29, 2004. Both motions alleged that the appeal was untimely. Case No. A-6029, filed on September 30, 2004, challenged the renewal of the building permits on or about September 10, 2004, and the issuance of sediment control permit number 213971. By motions filed on October 18, 2004, both the County and Respondents filed motions to dismiss the second appeal. In their opposition to the motions, Petitioners asserted that the absence of any notice of the issuance of the building permits violated their rights to procedural due process. The Board consolidated the appeals on October 6, 2004, and heard argument on the motions on November 10, 2004.

During the hearing before the Board, Petitioners attempted to introduce evidence relating to the alleged due process violations through testimony showing how the radio towers adversely affected their use and enjoyment of their property, and negatively affected the value of their property. App. 91. However, the Board refused to allow the testimony. *Id.*

In its Opinion dated March 29, 2005, the Board found that "the appeal of the building permits is untimely . . . ." App. 81. The Board also rejected Petitioners' due process argument, stating that Petitioners had "provided no support for the proposition that they have some constitutionally protected property right that was affected by the

issuance of the building permits . . . ." App. 86. The Board therefore dismissed the appeals. App. 88-89. Petitioners timely noted an appeal by filing a Petition for Judicial Review in the Circuit Court for Montgomery County, Maryland on April 11, 2005.

In its Memorandum Opinion and Order entered on October 19, 2005, the Circuit Court for Montgomery County, Maryland (Scrivener, J.) affirmed the Board's finding that Case No. A-6020 was not timely filed, because that appeal was not filed within 30 days of the issuance of the building permits. App. 69. However, the Court found that second appeal was timely because it was filed within thirty days of the issuance of the sediment control permit, which operated to "renew" the building permits. The Court remanded Case No. A-6029 "for a hearing on the appeal of the issuance of the building permits." App. 79. The Court did not address Petitioners' due process arguments. App. 77. Respondents filed a Notice of Appeal to the Court of Special Appeals of Maryland on or about November 2, 2005.

In its unreported opinion filed on October 24, 2006, the Court of Special Appeals reversed the portion of the circuit court's opinion that held that Case No. A-6029 was timely filed because it was filed within thirty days of the time that the permit was "renewed." *Evans v. Burruss*, No. 2013, slip op. at 19 (Md. Ct. Spec. App. Oct. 24, 2006). App. 41. However, in considering Petitioners' due process argument, the Court stated that it could not "decide the correctness, *vel non*, of the Board's finding that the protestants had no property rights adversely

affected by the grant of the permits when the Board prohibited the protestants from proving that some property rights of theirs were affected." App. 59. The Court therefore remanded the case to the Board of Appeals, with instructions that the Board

> receive evidence from [Petitioners] concerning the issue of whether their property rights were infringed by the issuance of the building permit to the Evanses. If the Board finds that the protestants have property rights that were infringed upon by the issuance of the building permit without notice, the Board should then consider the merits of Appeal No. A-6020.

App. 68. On January 12, 2007, Respondents filed a Petition for Writ of Certiorari with the Court of Appeals of Maryland, which was granted on April 11, 2007. On May 17, 2007, Montgomery County, Maryland filed a motion to participate as *amicus curiae*, which was granted by that Court on May 21, 2007.

In its opinion of October 12, 2007, the Court of Appeals of Maryland reversed that part of the decision of the Court of Special Appeals which addressed the due process issue. *Evans v. Burruss*, 401 Md. 586, 933 A.2d 872 (2007). The Court held that "the issuance of building permits and similar permits are ministerial acts," and, "as a matter of law, . . . the issuance of building permits to the owner of one property for construction on that property, creates no additional property rights in

adjoining or neighboring property owners." 401 Md. at 611. The Court therefore remanded the case with directions to affirm the decision of the Board of Appeals of Montgomery County. The result of the Court's decision is that appeals were dismissed as untimely, and the merits of the appeals were not addressed.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law related to procedural due process and property rights that has not been, but should be, settled by this Court. Petitioners submit that an owner of real property has a due process right to notice of the issuance of a building permit for construction on an adjoining property owner's land where the issuance of the permit will substantially affect the property interests of the aggrieved property owner. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Due process principles require that a deprivation of property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), *quoting*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Petitioners herein assert that the issuance of building permits for the construction of four 190 foot radio towers on land next to their own, without notice and an opportunity to be heard, amounts to a deprivation of their property interests without due process.

After granting Respondents' Petition for Writ of Certiorari, the Court of Appeals of Maryland ruled that a property owner ***has no due process right*** to notice of the issuance of a building permit for construction on an adjoining property owner's land where notice is not required by statute. This ruling is inconsistent with the line of cases in other jurisdictions that recognize that "land use decisions which "substantially affect" the property rights of owners of adjacent parcels may constitute "deprivations" of property within the context of procedural due process." *Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979), *citing*, *Scott v. City of Indian Wells*, 6 Cal.3d 541, 99 Cal. Rptr. 745, 492 P.2d 1137 (1972). "Land use decisions that affect property rights of adjacent landowners require procedural due process for the adjacent landowners as well as for the applicants." *van't Rood v. County of Santa Clara*, 6 Cal. Rptr. 3d 746, 113 Cal. App. 4th 549, 570, *quoting*, *Cohan v. City of Thousand Oaks*; 30 Cal. App. 4th 547, 558, 35 Cal. Rptr.2d 782 (1994).

This Court has stated that "'(d)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), and that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Thus, the issue of whether due process protections are implicated must be addressed on a case by case basis. Notwithstanding the need for a flexible approach in considering due process issues, the Maryland Court of Appeals held

in this case that the issuance of a building permit cannot, *as a matter of law*, "substantially affect" the property rights of adjacent property owners. The decision represents a sweeping, across the board rule, and does not allow for a case by case analysis in which a hearing authority may examine the manner in which property interests have allegedly been infringed. Allowing the decision to stand will deprive property owners who have received no actual notice of construction on adjoining property from any opportunity to show how their property rights have been adversely affected, *regardless of the circumstances*. The harshness of the decision is especially evident given that Petitioners were not provided with any notice as to the issuance of the permits, and were also denied the opportunity to present any evidence before the Board as to how their property interests were adversely affected.

The right under the Due Process Clause to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence. *See, e.g., Jennings v. Mahoney*, 404 U.S. 25 (1971). As the Court of Special Appeals correctly found, it would be impossible to "decide the correctness, *vel non*, of the Board's finding that the protestants had no property rights adversely affected by the grant of the permits when the Board prohibited the protestants from proving that some property rights of theirs were affected." App. 59.

CONCLUSION

Where property rights are substantially affected by the issuance of a building permit, the

aggrieved adjoining property owner has a procedural due process right to notice and an opportunity to be heard by the appropriate administrative hearing authority. The decision by the Court of Appeals of Maryland in this case tramples upon the constitutional rights of property owners by creating an absolute rule that the issuance of a building permit can never adversely impact an adjoining property owner's property rights to a level that implicates due process protections. In order for the constitutional rights of property owners to be protected, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

John Evans, et al. v. Thomas Burruss, et al.
No. 1, September Term, 2007

Headnote: The issuance of building permits is a ministerial act.

Where a building permit is issued to a property owner for construction on their property, that issuance does not create property rights in neighboring or adjacent property owners.

Where a zoning ordinance does not require the service of actual, personal notice to neighboring or adjacent property owners, the failure to give those neighboring or adjacent property owners actual, personal service is not a denial of due process.

Circuit Court for Montgomery County
Civil Case No. 260494

IN THE COURT OF APPEALS OF MARYLAND

No. 1
September Term, 2007

John Evans, et al.

v.

Thomas Burruss, et al.

Bell, C. J.
Raker
Harrell
Battaglia
Greene
Wilner, Alan M.
(retired, specially assigned)
Cathell,Dale R.
(retired, specially assigned),
JJ.

Opinion by Cathell, J.

Filed: October 12, 2007

John Evans, petitioner,[1] appeals to this Court from a judgment rendered by the Court of Special Appeals. In his petition for certiorari and in his brief he presented a single issue for our review:

> "Whether a neighboring property owner has a due process right to actual notice of the issuance of a building permit."

Thomas Burruss, et al.,[2] respondents, filed no cross-petition. We shall resolve only the question raised in the petition.[3]

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[1] As we note, *infra,* Montgomery County, Maryland, filed a motion to participate as *amicus curiae,* which we granted on May 21, 2007.

[2] Thomas Burruss and his wife, Judith Burruss, and Alan Gaunoux, collectively will be referred to as respondents or Burruss.

[3] Respondents, although having filed no petition of their own, in their brief advance two additional issues:

> "1. Whether the Board of Appeals erred as a matter of law by refusing to allow Respondents an opportunity to make a factual showing of substantial deprivation of their property interests based upon the issuance of the building permits.

I. Facts

On February 20, 2004, petitioner received a building permit[4] from Montgomery County to erect

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> "2. Whether the thirty day 'time for appeal' requirement is applicable to the facts of this case."

In a footnote in respondents' brief, Burruss acknowledges that his second issue was not addressed in petitioner's brief, but asserts that it was discussed in the petition for certiorari. In the petition, its mention was conditioned on a finding adverse to petitioner on the question directly presented in the petition. In light of our decision, the thirty-day issue will not be addressed.

We decline to separately address respondents' first question above. As indicated, respondents did not file a cross-petition. The issues before this Court, generally, are limited to the questions presented in petitions, not other, or additional, questions that later appear in briefs. Accordingly, except to the extent that respondents' first question might be indirectly discussed in our treatment of the question in the petition, it too will not be addressed.

[4] That general building permit, like most such permits for projects that meet general zoning and building code requirements, is not required to be subject to a public hearing process, although the file and all matters relating to it are public records and available to members of the public, including these respondents, for examination. That permit, as with the ten

four amateur radio (ham radio) towers, each 190 feet in height, on his property in Poolesville, Maryland. On June 23, 2004, he received a revised building permit. Approximately five weeks later, on August 5, 2004, construction commenced. Upon seeing construction trucks (cement trucks pouring concrete), work being done, and holes being drilled on petitioner's property, respondents, the abutting property owners, checked with the county authorities and then became aware, for the first time, of the permits that had been issued for the construction of the towers. On August 13, 2004, respondents requested the Montgomery County Department of Permitting Services (DPS) to issue a stop work order.[5] DPS refused respondents' request.

On August 30, 2004, respondents noted two appeals to the Board of Appeals of Montgomery County in respect to the issuance of the building permits (and sediment control permit issued),[6] claiming that they had been unlawfully issued. Petitioner and Montgomery County (which intervened in the cases before the Board of Appeals), moved to

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thousand or more building permits, or other types of permits, issued in Montgomery County annually, was issued in the usual course of business.

[5] A stop work order was subsequently issued by DPS in respect to a possible minor sediment control issue.

[6] DPS had initially determined that the project did not meet the threshold for requiring a sediment control permit. Later when its determination came into question, petitioner, although it is not clear that he was required to do so, nonetheless applied for and received a sediment control permit.

dismiss the appeals. The motions were granted by the Board. It based one dismissal on untimeliness, and the other because there was no basis to appeal the issuance of a sediment control permit, and because it (the Board) had no authority to hear the appeal.

Respondents then filed a petition for judicial review with the Circuit Court for Montgomery County. Again, the petitioner and Montgomery County moved to dismiss the petition for judicial review. The Circuit Court upheld the Board's finding that the appeal of the original issuance of the building permit was untimely, but found that the subsequent issuance of the sediment control permit had the effect of renewing the building permit, making the appeal timely. On that basis, the Circuit Court remanded the case to the Board for it to entertain the appeal of the building permit. At that point, petitioner filed a notice of appeal of the Circuit Court judgment to the Court of Special Appeals. That Court, in an unreported opinion, issued October 14, 2006, reversed the findings of the Circuit Court that the issuance of the sediment control permit had renewed the issuance of the building permit and that the appeal of the building permit, therefore, had been timely. In other words, the Court reinstated the Board's decision that the appeal of the building permit had been untimely. The Court of Special Appeals, however, remanded the case to the Board of Appeals for it to determine whether respondents

had a general[7] due process right to actual personal notice of the issuance of the building permit and/or a property right that was adversely affected by the issuance of the permit. We granted certiorari. *Evans v. Burruss*, 398 Md. 313, 920 A.2d 1058 (2007).[8]

II. Standard of Review

Our review of the agency's decision entails only an appraisal and evaluation of the agency's fact-finding and not an independent decision on the evidence. *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569, 709 A.2d 749, 753 (1998); *Anderson v. Dep't of Public Safety & Correctional Services*, 330 Md. 187, 212, 623 A.2d 198, 210 (1993). When the agency is acting in a fact-finding or quasi-judicial capacity, we review its decision to determine "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." *Dep't of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 224, 334 A.2d 514, 523 (1975); *see Goodwich v. Nolan*, 343 Md. 130, 148,

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[7] General, as used here, means as opposed to a specific provision in the Montgomery County statutes requiring actual personal notice to neighbors of the issuance of building permits for specific properties. The parties have not informed the Court of any such requirement in respect to the general, normal issuance of building permits in Montgomery County. We know of none.

[8] Montgomery County, Maryland filed a motion to participate as *amicus curiae*, which we granted on May 21, 2007.

680 A.2d 1040, 1049 (1996); *Weiner v. Maryland Ins. Admin.*, 337 Md. 181, 190, 652 A.2d 125, 129 (1995).

"[A] reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency. ..." *Baltimore Lutheran High School Ass'n, Inc. v. Employment Security Admin.*, 302 Md. 649, 662, 490 A.2d 701, 708 (1985); *see State Highway Admin. v. David A. Bramble, Inc.*, 351 Md. 226, 238, 717 A.2d 943, 949 (1998); *Anderson*, 330 Md. at 212, 623 A.2d at 210; *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). In this context, "' [s]ubstantial evidence,' as the test for reviewing factual findings of administrative agencies, has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]'" *Bulluck*, 283 Md. at 512, 390 A.2d at 23 (quoting *Snowden v. Mayor & City Council of Baltimore*, 224 Md. 443, 448, 168 A.2d 390, 392 (1961)); *see Catonsville Nursing Home*, 349 Md. at 569, 709 A.2d at 753; *Caucus Distributors, Inc. v. Maryland Securities Comm'r*, 320 Md. 313, 323-24, 577 A.2d 783, 788 (1990). We have stated that, "[a] court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 552-53, 723 A.2d 440, 450 (1999)(quoting *United Parcel Service, Inc. v. People's Counsel*, 336 Md. 569, 576-77, 650 A.2d 226, 230 (1994)). "A reviewing court is under no constraints in reversing an administrative decision that is premised solely upon an

erroneous conclusion of law." *Prince George's County v. Brown*, 334 Md. 650, 658, 640 A.2d 1142, 1146 (1994); *see Catonsville Nursing Home*, 349 Md. at 569, 709 A.2d at 753 (quoting *Insurance Comm 'r v. Engelman*, 345 Md. 402, 411, 692 A.2d 474, 479 (1997)); *People's Counsel* v. *Maryland Marine Mfg. Co.*, 316 Md. 491, 497, 560 A.2d 32, 34-35 (1989).

"We are also obligated to 'review the agency's decision in the light most favorable to the agency,' since their decisions are *prima facie* correct and carry with them the presumption of validity." *Catonsville Nursing Home,* 349 Md. at 569, 709 A.2d at 753 (quoting *Anderson*, 330 Md. at 213, 623 A.2d at 211; *Bulluck,* 283 Md. at 513, 390 A.2d at 1124). We have noted that our review of an administrative agency's decision differs markedly from our review of the decision of a trial court in other types of civil cases:

> "In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency."

United Steel Workers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp., 298 Md. 665, 679, 472 A.2d 62, 69 (1984).

III. Discussion

A. Are Property Interests Generally Created by Zoning Ordinances?

The Supreme Court of the United States, when discussing the Fourteenth Amendment's procedural protection of property, has stated that:

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> *"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or*

> *understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."* (Emphasis added.)

Board of Regents of State Colleges v. *Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). In *Cleveland Board of Education v. Loudermill,* the Supreme Court reaffirmed *Roth,* saying:

> "Respondents' federal constitutional claim depends on their having a property right in continued employment. If they did, the State could not deprive them of this property without due process.
>
> "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' *The Ohio statute plainly creates such an interest.* Respondents were 'classified civil service employees,' entitled to retain their positions 'during good behavior and efficient service,' who could not be dismissed 'except... for... .misfeasance, malfeasance, or nonfeasance in office' .... The statute plainly supports the conclusion, reached by both lower courts, that respondents

> possessed property rights in continued employment." (Citations omitted.) (Emphasis added.) (Footnotes omitted.)

Loudermill, 470 U.S. 532, 538-39, 105 S. Ct. 1487, 1491, 84 L. Ed. 2d 494 (1985).

Unlike the Ohio statute referred to by the *Loudermill* Court, there is no ordinance or other statute that has been brought to our attention, or that we have found, that "plainly" creates any right for the resp ondents to participate in the purely "ministerial" process leading to the issuance of a building permit where the application and the permit are in accordance with the law.

Montgomery County Code ("MCC") (2003),[9] § 8-25, provides that where the application complies with all the requirements of the building and zoning provisions, the Director *"must"* issue a permit as soon as practicable. Section 8-25 provides in relevant part:

> "(a) Action on application. The Director must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing

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[9] This portion of the MCC has remained unchanged from 2003 to the present.

> and specify the reasons for rejecting it. If the proposed work conforms to all requirements of the Chapter and all other applicable laws and regulations, the Director *must issue a permit for the work as soon as practicable.*" (Emphasis added.)

Sub-section (g) further provides:

> "The building permit or a true copy thereof and a copy of the building or other plans covered by the permit shall be kept on the site of operations open to inspection by the department, fire or police officials in the course of their duties, during the entire time the work is in progress and until its completion."

We have been directed to no further express requirement in the MCC, under the circumstances here present,[10] placed on the permit holder or the Director or any other official to notify abutting or

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[10] There is a provision in the MCC requiring a more conspicuous notice for new construction on vacant, residentially or agriculturally zoned land that would affect the footprint or height of any existing structure. The Board found that provision did not apply in the circumstances of this case. That issue has not been preserved for this Court because of the limited nature of the issue raised in the certiorari petition and the absence of a cross-petition. That issue is not before us and we do not decide it.

neighboring property owners of the issuance of a building permit. We have found none. Accordingly, the MCC itself creates no right of notice nor does it create any additional property rights in adjacent property owners that they do not have inherently.[11]

In *Feldman v. Star Homes, Inc.*,[12] neighbors contended that, as neighboring property owners, they had a constitutional right to public hearings in respect to an approval of a subdivision plan, even though the local statutes did not require public hearings. The Court held:

> "[W]e find nothing in the sections dealing with subdivision plans that requires notice or a public hearing. Indeed, under Section 118, it is provided that the mere failure of the Commission to act upon a plan submitted to it shall be equivalent to approval.... In the absence of... restrictions duly imposed by the zoning authorities, it is still true that a property owner has the right to use his property as he sees fit, so long as the use does not constitute a nuisance.

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[11] We do not address whether the County could create such property rights.

[12] *Feldman* was an action for declaratory judgment, not a petition for judicial review. Nonetheless, its language remains relevant in the constitutional context.

> "The appellants contend, however, that they have a constitutional right to a hearing before a street layout is approved by the Commission. ... In the instant case it does not appear that property rights of the appellants were affected by the Commission's approval."

Feldman, 199 Md. 1, 6 , 84 A.2d 903, 905 (1951). Referring to *Feldman,* this Court in *Clarke v. County Commissioners for Carroll County,* stated:

> "This leaves for our remaining consideration only appellants' argument that they were denied a hearing prior to approval of the [subdivision] plan.... [N]either Art. 66B nor the subdivision regulations require that a public hearing be conducted by the commission before acting on sub division plans. *Nor does this argument rise to a constitutional level*....(Emphasis added.)

270 Md 343, 350, 311 A.2d 417, 421 (1973). Neither *Feldman* nor *Clarke* has been overruled and they remain the law in this State. Indeed, this point of law in *Feldman* has been recognized as the "contrary view" to that of another jurisdiction. In *Horn v. County of Ventura,* the California Court opined on the position then extant in that State in respect to notices and hearings of applications for subdivisions of land:

> "[The] party urges that plaintiff [adjacent property owner] suffered no

> significant deprivation of property which would invoke constitutional rights to notice and hearing. However . . . land use decisions which 'substantially affect' the property rights of owners of adjacent parcels may constitute 'deprivations' of property within the context of procedural due process. . . . (For a contrary view, *see Feldman v. Star Homes* (1951) 199 Md. 1, 84 A.2d 903 and *Hancock v. City of Concord* (1974) 114 N.H. 404, 322 A.2d 605.)"

24 Cal.3d 605 (1979).

In *Hancock,*[13] statutory provisions[14] provided that *abutting* property owners were entitled to participate in hearings in respect to applications for subdivision approval. The issue involved whether non-

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[13] In a later case, *Weeks Restaurant Corp. v. City of Dover,* 119 N.H. 541, 404 A.2d 294 (1979), the New Hampshire Court overruled the *Hancock* decision on an aggrieved party issue based on the zoning and planning nature of that case. The present case, as it appears before us, does not involve planning and zoning. It is a building permit case.

[14] We have not been directed to any statutory provisions in the instant case applicable in Montgomery County that specifically provide for notice to adjacent or neighboring property owners, or that provide for hearing, prior to the issuance of a building permit that is permitted as of right. We know of none.

abutting, but nearby, property owners[15] were entitled to be heard at the hearings in respect to applications for subdivision approval. The Court identified the issue as: "[W]hether nonabutters have a right to be heard at a hearing before the Concord Planning Board concerning an application for subdivision under RSA [Revised Statutes Annotated] 36:23. *Hancock v. City of Concord,* 114 N.H. 404[, 322 A.2d 605] (1974)." That Court opined:

> "Mr. Sylvia sought to subdivide his land into separate parcels for the purpose of erecting garden apartments, a permitted use in the R-3 district. Notice of a May 1, 1972 hearing....was sent to abutters of the Sylvia property as required by RSA 36:23.
>
> "Plaintiffs, as nonabutters were not entitled to notice under RSA 36:23 and were not notified of the hearing by the planning board, but learned of the hearing and were in attendance.... They alleged before the superior court that their properties would be affected . . . and that they [had] intended to speak at the hearing, but were not given that opportunity. Plaintiffs argue that the decision of the board without giving them an opportunity to speak at the hearing amounted to a deprivation of

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[15] The statute there involved required notices of hearings to be sent to owners of abutting property. There were no provisions requiring notice to other nearby property owners.

> their property rights without due process of law."

Hancock, 114 N.H. at 404-06, 322 A.2d at 605-06. The New Hampshire Court went on to hold that:

> "We do not agree that failure to allow plaintiffs an opportunity to speak at a hearing pursuant to RSA 36:23 amounts to an unconstitutional deprivation of their property rights under the due process clause. While the legislature could have provided for a public hearing . . . as it has in several other sections . . . failure to so provide is in no way violative of the due process clause nor inconsistent with the basic principles of representative government."

Hancock, 114 N.H. at 407, 322 A.2d at 607. *See Carter v. City of Nashua,* 116 N.H. 466, 362 A.2d 191 (1976).

Laclede Gas Co. v. Abrahamson, 296 S.W.2d 100 (Mo. 1956), was a condemnation case where the plaintiffs were seeking to intervene in an action in which property belonging to another property owner was being taken. Citing *Feldman* and other cases, the Court opined:

> "'Interest,' generally, means a concern which is more than mere curiosity, or academic or sentimental desire. One interested in an action is one who is interested in the outcome or result

> thereof because he has a legal right which will be directly affected thereby or a legal liability which will be directly enlarged or diminished by the judgment or decree in such action.'
>
> "The Court held that no right to intervene was shown because the intervenor showed 'no direct interest in the litigation but only a consequential interest in the probable use of the property if plaintiff is successful, and no possibility of gain or loss from the direct legal effect of any judgment that might be rendered.'"

Laclede Gas Co., 296 S.W.2d at 102-103.

Returning to our own State, we recently discussed a similar issue. In a case involving the Public Service Commission, where there was a statutory provision requiring advertisement of a public hearing, but no other notice requirement, neighboring property owners asserted that they were entitled to actual personal notice of the hearing. The question posed, as relevant to the instant case, *in Sprenger v. Public Service Commission of Maryland*, 400 Md. 1, 5, 926 A.2d 238, 240 (2007),[16] was: "Is an interested person....entitled to bring an action for declaratory relief if the Public Service Commission

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[16] The proposed project was 10.8 linear miles of wind turbines to be erected at high elevations in Western Maryland. It was a facility designed to generate energy from wind.

fails to provide [actual personal] notice [to the 'interested person'] and the time to file an appeal. .. has expired?" After noting that the only express requirement for a general notice of the hearing through newspaper publication had been met, we addressed the contention that Sprenger was entitled to actual personal notice of the hearing.

> "There is no requirement in [the statutes] that *personal service of notice be* given to interested persons. Those sections only require that *notice* be given to interested persons. If we were to agree with petitioners that these sections required personal service of notice, we would be, at best, forcing an interpretation that limits the manner in which notice may be given...
>
> "[U]nder petitioner's theory, all interested persons should receive personal service of notice. Petitioners, without substantive explanation, define interested persons as those owning property contiguous to the Facility and those within half a mile of the project.... [H]ow then would the Commission determine who are interested persons? In the circumstances of this case should individuals whose sight lines are affected by the towers be included? They could be five miles or more away located in the mountainous terrain where the Facility is sited...And what about those thousands who might claim to be, or to pass, within

> earshot of the spinning blades? Would all of such persons or groups, and many others, be entitled to 'personal' individualized service of notice?
>
> "The extent of the pool of interested persons could never be determined. . . . The agency could never be sure it had served notice, by certified mail or otherwise, on all interested parties."

Sprenger, 400 Md. at 30-32, 926 A.2d at 255-56.

This case also involves high towers, albeit less than half as tall as the towers in *Sprenger*. We have found no evidence in the record we have reviewed that indicates that the fall pattern[17] of the towers was an issue. As far as can readily be discerned, the issue revolves around the towers being in the line of sight of respondents.[18] While the area from which the "pool of interested persons" might come may well be less in the present case than the potentially impacted area in *Sprenger*, depending on demographics, the "pool of interested persons" might well be larger. If individualized personal notice were to be required, how could the agency ever verify that it had given such notice to all "interested persons?" How could it do so in the over 10,000 instances of ministerial building permit issuances each year in that county and the numerous other types of permits issued in

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[17] Fall pattern relates to the direction, and where, the towers would fall—if they fell.

[18] It might be described by some as visual pollution.

Montgomery County? In cases such as this, where the underlying issue involves sight lines, hundreds, if not thousands, of individualized personal notices might be required.

This is not a case where municipal authorities have the right to exercise initial discretion. It is not a request for a variance. It is not a request for piecemeal rezoning. According to the record, at the time of the original issuance of the permit, petitioner's project complied with the provisions of the land use codes and building codes.[19] As such, the issuance of the building permit was a purely ministerial act.

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[19] There was an issue, before the Board, as to whether the towers complied with the zoning code at the time of original issuance. On judicial review, the trial court agreed that it did. The Court of Special Appeals did not reverse that finding. As we have indicated, respondents filed no cross-petition and petitioner did not raise that issue in his petition. Accordingly the correctness of that ruling is not before us.

The issue of whether the project was controlled by the amendment ultimately made to the zoning code resulting from respondents' complaints to county officials, or by the Code as it existed at the time of the issuance of the building permits, was litigated below.

While the issue of "vested rights" is not properly before us, and accordingly, we do not resolve that issue, we do note, as we indicated above, that the construction of the towers commenced on August 5, 2004. That construction was observed and then

verified by respondents no later than August 13, 2004. The amendment to the ordinance, which respondents argued below should have been binding on petitioner, was not enacted until December 26, 2005, over 15 months after the construction had begun and respondents were aware of it. The date on which "vesting" (construction should be so advanced that the nature of the construction could be observed by persons passing by) under Maryland jurisprudence, would be determined, would be the date when the amendment was enacted, in this case December 26, 2005.

Judge Moylan, for the Court of Special Appeals in *Town of Sykesville v. West Shore Communications, Inc.*, 110 Md. App. 300, 677 A.2d 102 (1996), reiterated the standards gleaned from our cases for "vesting" in Maryland:

> "For a right to proceed with construction under existing zoning to vest, three conditions must be satisfied: 1) there must be the actual physical commencement of some significant and visible construction; 2) the commencement must be undertaken in good faith, to wit, with the intention to continue with the construction and to carry it through completion; and 3) the commencement of construction must be pursuant to a validly issued building permit."

100 Md. App. at 305, 677 A.2d at 104 (quoting *Prince George's County v. Sunrise Development Ltd. P'ship*,

330 Md. 297, 314, 623 A.2d 1296, 1304 (1993)). In respect to the first condition, that Court stated:

> "'If the public could have seen that construction had started *before the zoning change,* the public can appreciate that the new law is not being violated.'. .
>
> "By contrast with... *Sunrise,* the construction completed in this case...was no mere 'token' construction but was extensive. It was, moreover, readily apparent and visible [on the date the ordinance was changed] to any interested neighbors or other observers....
>
> "'By the time the ordinance was adopted the site had been graded; an excavation for the tower base had been dug; and two layers of rebar steel had been installed. . . .'
>
> "'In the context in which the work was being performed, the work clearly indicated that a tower was being erected.'" (Emphasis added.)

Sykesville, 110 Md. App. at 320-21, 677 A.2d. at 111-12.

It seems highly unlikely, given the fact that respondents had observed construction which flagged its nature fifteen or more months earlier, that

B. The Issuance of Building Permits, Generally, is a Ministerial Act

We recently stated in *City of Bowie v. Prince George's County*, that:

> "The City's third and final issue challenges the sufficiency of the notice given of the filing of the application for final plat approval and the Planning Board's hearing thereon. The City asserts that it was denied due process rights by the Board's failure to provide it notice that Green Hotels had filed for final plat approval and that the Board had scheduled the matter for hearing. The parties argue at length whether the Board's action . . . should be deemed ministerial, and thus relieved of any externally-imposed formal notice requirement or should be labeled discretionary, therefore making it incumbent upon the Board to provide actual notice to the City. . . .

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petitioner had not progressed with construction to the point that the nature of what was being built would be readily observable to passersby on December 26, 2005 - especially given that the towers were destined to be 190 feet tall.

There being no cross-petition, however, it is not necessary, as we indicated, to resolve the issue of "vesting."

> 'It is elementary that governmental bodies, tribunals, agencies ... and officials ... exercise functions that are divided into three general categories: executive [i.e., ministerial], judicial, and legislative .... And functions, when they are not purely and completely judicial or legislative in nature, but have qualities or incidents resembling them, are referred to as quasi-judicial or quasi-legislative [i.e., discretionary].'

"Ministerial acts are objective in nature and include, for example, the issuance of a building permit, predicated upon presentation of final plat approval, as in the case *sub judice*. . . .

"The City also argues that it was entitled not just to notice but to 'meaningful' notice of the Board's acceptance....of Green Hotels' final plat. Green Hotels contends that the Subdivision Regulations . . . are purposely silent as to any procedure requiring notice or public hearing at the final plat stage...

"[We hold that] as the Board's act of approving or rejecting the final plat is a

> ministerial function, we find no merit in the City's contention that it was denied due process by the Board's failure to provide it specific and individualized notice of the Board's receipt and scheduling of Green Hotels' application for final plat approval."

Bowie, 384 Md. 413, 439-43, 863 A.2d 976, 991-93 (2004) (quoting *Hyson v. Montgomery County Council,* 242 Md. 55, 62, 217 A.2d 578, 582-83 (1966)). *See Martin v. Bucklin,* 214 Md. 140, 142-43, 133 A.2d 426, 426-27 (1957) (recognizing the ministerial nature of the application and issuance process in respect to building permits in denying mandamus). In *Potomac Electric Power Company v. Montgomery County,* 80 Md. App. 107, 118, 560 A.2d 50, 56 (1989), where, albeit perhaps as dicta, Chief Judge Gilbert, for the intermediate appellate court, opined: "Once the PSC has by order authorized the erection of power lines along a designated route, little more remains for local government to do except perform the ministerial duty of issuing the necessary building permits."[20]

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[20] Many other jurisdictions also generally consider the approval and issuance of building permits, or similar acts of approval by governmental officials, as ministerial in nature. *See Ridgeview Partners, LLC v. Entwistle,* 354 F. Supp. 2d 395, 400 (S.D.N.Y. 2005) (Where the court defined ministerial acts, such as the issuance of a building permit, as an act without discretion to grant or deny, and not subject to review.); *Wal-Mart Stores, Inc. v. County of Clark,* 125 F. Supp. 2d 420, 427 (D.Nev. 1999) ("Further, the issuance of a building permit is a purely

ministerial act in this case."); *Prentiss v. City of South Pasadena,* 18 Cal. Rptr. 2d 641, 645 (1993) ("'[T]he following actions shall be presumed ministerial: [] (1) Issuance of building permits.'") (quoting Cal. Admin. Code, tit. 14 § 15268); *G.B.V. International, Ltd. v. Broward County,* 709 So. 2d 155, 156 (Fla. 1998) ("[T]he developer had complied with all of these requirements, so that approval was a ministerial function.")(overturned on other grounds at *Broward County v. G.B. V. International Ltd.,* 787 So. 2d 838 (2001)); *Citizens Against Reckless Development v. Zoning Bd. of the City and County of Honolulu,* 114 Haw. 184, 200, 159 P.3d 143, 145 (2007); *Clegg v. Zoning Board of Appeals of the City and County of Honolulu,* 73 Haw. 1, 7, 826 P.2d 876, 879 (1992) ("[W]e characterized the function of the Building Department in its issuance of a building permit as 'purely ministerial.'"); *U.S. Home & Development Corp. v. LaMura,* 89 N.J.Super. 254, 259, 214 A.2d 538, 541 (1965); *67 Vestry Tenants Ass'n v. Raab,* 658 N.Y.S.2d 804, 809, 172 Misc.2d 214, 219-20 (Sup. 1997) (Ministerial acts such as building permits are exempted from statutory provision allowing review.); *Charter Land Development Corp. v. Hartmann,* 566 N.Y.S.2d 375, 376, 170 A.D.2d 600, 601 (1991) ("Once a variance had been granted, the respondent was not bestowed with any discretion, but was obligated to issue the building permits as a ministerial act. . . ."); *Parks v. Bd. of County Comm'rs of Tillamook County,* 11 Or. App. 177, 203, 501 P.2d 85, 98(1972) ("'The issuing of permits has often been held to be an administrative or ministerial act. . . .'") (quoting 2 Rathkopf, *The Law of Zoning and Planning* 55-

3, 55-4 (3d ed 1966)); *McNaughton Co. v. Witmer,* 149 Pa.Commw. 307, 613 A.2d 104 (1992); *Walrath v. Fisher,* 20 Chest. 50, 54 Pa. D. & C.2d 709, 711-12 (1971) (holding that mandamus lies to direct an official to perform his ministerial duty of issuing a building permit); *Rhodes v. Shapiro,* 494 S.W.2d 248, 250 (Tex. Civ. App. 1973) ("Where ... the applicant complies with all existing requirements, the issuance of a building permit. . . becomes a mere ministerial duty."); *Homebuilders Ass 'n of Kitsap County v. City of Bainbridge Island,* 137 Wash. App. 338, 341, 153 P.3d 231, 233 (2007) (Where the determination of where in the budget to account for fees the Court stated: "All fees and costs associated with processing ministerial building permits are accounted for in the Building Subfund.").

In *Asche v. Bloomquist,* where a nuisance action was attempting to be maintained in the face of claims that appellant had to exhaust administrative remedies in respect to her attempt to oppose the building of a house that would obstruct her view of Mt. Rainier, the Court, in addressing a specific statutory provision, held:

> "Here, the first element... is met. They lost their view of Mt. Rainier when the Bloomquists began building their house under the permit's authority. The last element is also met. The KCC [Kitsap County Code] provisions do not specify an appeal process for building permits. The closest analogous code provisions indicate that an applicant can

Accordingly, we hold that the issuance of building permits in respect to applications that fully comply with applicable ordinances and regulations of a particular subdivision is a ministerial act. No notices beyond that provided for in the applicable laws of the particular jurisdiction are normally required. The failure to give notice when none is required by constitution or statute, is

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> appeal ministerial decisions, but it does not provide for appeals by neighbors. Accordingly, there was no administrative process for the Asches to exhaust." (Citations omitted.)

Asche, 132 Wash.App. 784, 792, 133 P.3d 475, 479 (2006). *See Lincoln Shiloh Associates, Ltd. v. Mukilteo Water District,* 45 Wash.App. 123, 128, 724 P.2d 1083, 1086 (1986) ("[P]rocessing a building permit is a ministerial act. . . ."); *Pentagram Corp. v. City of Seattle,* 28 Wash.App. 219, 227, 622 P.2d 892, 896 (1981) ("The issuance of building permits . . . generally is considered ministerial in the sense that the applicant is entitled to a permit once it complies with the applicable laws and ordinances.").

not, normally, a denial of due process,[21] nor is it the deprivation of any of the bundle of rights incident to the ownership of private property.

C. Adjoining Owners' Property Rights in the Permitting Process

We shall now examine what property rights, if any at all, an abutting or neighboring property owner (or owners) may have in respect to the uses of nearby property when such uses are permitted by zoning or other governmental regulation. In that examination we are especially cognizant of the police power aspect, i.e., its limitations, of the zoning laws. We have not been directed to any of our cases, nor have we discovered any, in which this Court has held that the issuance of a building permit for one property, creates or interferes with property rights of owners of adjoining properties.

Several of our cases, including *England v. Mayor and Council of Rockville,* 230 Md. 43, 185 A.2d 378 (1962), which involved a zoning reclassification, indirectly indicate exactly the opposite. *England* briefly discussed, somewhat obliquely, neighboring property rights in the police power context. After the trial court had basically found that England, the property owner applying for a reclassification, was entitled to it, the lower court had, nonetheless, upheld the denial of the reclassification based

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[21] Due process concerns may exist when notices are required to be given by constitution or statute and it is alleged that they have not been made.

upon neighboring owners' concerns. There, we said:

> "We think appellants proved their case. The Chancellor stated in his opinion that 'from a view of the property it is apparent that eventually all of the land in the vicinity, and including the subject property, should be zoned for industrial and/or commercial purposes.' . . . He stated that the proposed change 'would be of no benefit' to surrounding property owners. We think the chancellor misapplied the applicable principles of law to the facts of this case.. . .
>
> "There was clear evidence of original mistake or change of condition . . . . Under the circumstances, *benefit to the neighboring residents is not a proper test.* Restrictions imposed under the police power must be related to the general welfare and cannot be supported on the basis of benefit to surrounding property." (Emphasis added.)

England, 230 Md. at 46, 185 A.2d at 380. Similarly, in the earlier reclassification case, *Hoffman v. Mayor and City Council of Baltimore,* we stated:

> "If a residential neighborhood desires protection by a border of unused property, necessarily it must provide its

> own property, not appropriate its neighbors' for this purpose. 'In order to impose restrictions some valid exercise of the police power must be proven. But such power is invoked for the protection of the property restricted and not to give protection to surrounding prop erty.'"

Hoffman, 197 Md. 294, 301, 79 A.2d 367, 510 (1950) (quoting *Chayt v. Maryland Jockey Club,* 179 Md. 390, 395, 18 A.2d 856, 858 (1941)).

Chayt v. Maryland Jockey Club, supra, involved Pimlico Race Track and a change to the original zoning for the particular area. Part of the race track property involved had been grand-fathered as a non-conforming use and had been used mainly for parking. Maryland Jockey Club applied for permits to construct stables on the site. Neighboring residential property owners sought and received an injunction restraining the Jockey Club from constructing the stables near their residential property. Thereafter, the zoning ordinance was amended so as to permit, as of right, the construction of the stables. The Jockey Club then petitioned the trial court to dissolve the injunction based upon the change in zoning classification. The injunction was dissolved and the neighboring residential property owners appealed. This Court, in deciding that the original enactment of the zoning ordinance had created no property rights in the abutting residential property owners, stated:

> "In order to impose restrictions some valid exercise of the police power

must be proven. But such power is invoked for the protection of the property restricted and *not to give protection to surrounding property.* It is basic to the law of property that a man shall be allowed the widest use of his property consonant with the protection of his neighbors. In order to justify therefore the restriction of that use, it must be shown that such restriction is in some manner related to the police power of the sovereign.

"The imposition of that restriction, however, creates no vested *[property]* right [in neighboring property owners] in the continuance of that [previous zoning] condition [on the properties of the applicant].

"Since, therefore, appellants [neighboring property owners] acquired no vested [property] right under the original Zoning Ordinance, it follows that the amending ordinance placing neighboring properties in a lower classification, and to that extent freeing such properties from the burdens of the original ordinance, deprives appellants [neighboring property owners] of no legal rights in as much as it takes nothing from them that they have a right to insist upon." (Emphasis added.)

Chayt v. Maryland Jockey Club, 179 Md. at 395, 18 A.2d at 858-59.

The issue has been indirectly addressed in at least one other state. The issue was presented in *Weaver v. Bishop,* 52 P.2d 853 (Okla. 1935), like *Chayt,* a case for injunctive relief by adjoining property owners, in respect to the uses being made of property for which a building permit had been used. As in the instant case, the matter of the absence of notice of the issuance of the permit also was presented in that the time for appeal had expired before the adjoining property owners discovered the use. There the Supreme Court of Oklahoma held:

> "The plaintiffs further allege that if it be construed that the defendant has a good and valid permit to construct said filling station, and that plaintiffs are barred from appealing the action of the said building inspector . . . that plaintiffs will be deprived of their property without due process of law...
>
> ...
>
> "[D]efendants allege that said zoning ordinance was duly passed and approved in the manner required by law, after due notice to property owners, and that the plaintiffs had the right at all times to make application to the legislative body . . . to amend the said ordinance, and could . . . have submitted . . . all the questions and objections now sought to be presented ....that plaintiffs under said ordinance

have no right to an appeal to the action of the building inspector in granting the permit herein, and that if the plaintiffs had any such right to appeal, that such right was lost in thatthe appeal was not taken within the time prescribed.

...

"The plaintiffs' response is in substance thatthe building permit issued to the defendant. . . was void for want of notice to the plaintiffs .... "The evidence is that no notice...was given either of the plaintiffs, and that the plaintiffs had no knowledge of same until after the expiration of more than ten days [the appeal period]. The zoning ordinance...does not provide for such notice...

"The record does not disclose that under the ordinance of Tulsa that notice to other parties is required generally in obtaining municipal permits, and the rule is that, where no notice is required, failure to give notice does not affect the validity of the permit.

"The function of municipal building permits is to evidence compliance with the applicable ordinances and regulations and that the proposed construction meets building requirements. 'Where the

> prerequisite conditions have been complied w ith on the part of the applicant, the Board or official may have no discretion to refuse the permit for some reason other than a non-compliance with the conditions precedent; and such an applicant may invoke the aid of the court to prevent the unreasonable refusal and to compel the granting of the permit.' *The issuance of such a permit is not ordinarily an adjudication of the property rights of third persons."* (Citations omitted.) (Emphasis added.)

Weaver v. Bishop, 52 P.2d at 856-58.

If any such property rights exist when a permitting ordinance does not require notice, they must be discovered in background principles of property law.[22] Actual physical invasions of one's

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[22] The term "background principles of the State's law of property and nuisance" came into the modern language of real property in the often cited case of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029, 112 S. Ct. 2886, 2900, 120 L. Ed. 2d 798 (1992), where, in a regulatory "takings" context, the Court noted:

> "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that

property may be addressed by suits in ejectment, perhaps trespass, in respect to title-actions to quiet title and the like. None of these situations appear to exist in the present case. Some actions that might exist relating to uses of adjacent property include, and primarily are related to, actions to abate private nuisances. In *Prah v. Maretti,* 108 Wis.2d223, 232, 321 N.W.2d 182, 187 (1982), that Court restated the concept that applies in Maryland as well: "The private nuisance doctrine has traditionally been employed ... to balance the conflicting rights of landowners . . . ."[23]

> background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."

[23] At one time in England as a part of nuisance law, the Doctrine of Prior Appropriation and the Doctrine of Ancient Lights applied. The former held that the first user to appropriate a resource had the right to the continued use of the resource. The latter held that if a "landowner had received sunlight across adjoining property for a specified period of time, the landowner

Private nuisances, moreover, are not a normal element of rights arising out of the issuance of building permits even when notice requirements exist, and private nuisances, if they exist, normally do so independently of the issuance of any public permits. Generally, they cannot be litigated in a petition for judicial review of administrative agency actions.

The cases before this Court, giving rise to the single question properly before us, are both administrative petitions for review. Neither of them is a request for abatement of nuisances.[24]

IV. Conclusion

We hold that where, such as in this case, the relevant statute applicable to the issuance of permits as a ministerial act does not require the service of actual, personal notice to adjacent or neighboring property owners, the failure to do that which is not required to be done is not a denial of due process. We

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was entitled to continue to receive unobstructed access to sunlight across the adjoining property." *Prah,* 108 Wis.2d at 233, 321 N.W.2d at 188 (footnote omitted). Even if these doctrines survived in this country. It is doubtful that they would apply to the construction of amateur radio towers, such as these in the case *sub judice.*

[24] We are informed that actions, other than this action in respect to a review of administrative decision, are pending and have been stayed below, awaiting the outcome of this action.

hold further that, generally, the issuance of building permits and similar permits are ministerial acts. Finally, we hold, as a matter of law, that the issuance of building permits to the owner of one property for construction on that property, creates no additional property rights in adjoining or neighboring property owners. Accordingly, we reverse that part of the Court of Special Appeals' judgment that remanded the case to the Board of Appeals to receive evidence in respectto whether the issuance of the building permit infringed upon the respondents' "property rights." The judgment of the Court of Special Appeals as to the non-renewal (via the sediment control permit) of the building permit and the timeliness or lack thereof is otherwise affirmed. The result of our holding is that the decision of the Board of Appeals of Montgomery County is to be affirmed.

THE DECISION OF THE COURT OF SPECIAL APPEALS IS REVERSED IN PART AND AFFIRMED IN PART; CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY WITH DIRECTIONS TO AFFIRM THE DECISION OF THE BOARD OF APPEALS OF MONTGOMERY COUNTY; COSTS TO BE PAID BY RESPONDENTS.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

NO. 2013

September Term 2005

JOHN EVANS, ET AL.

V.

THOMAS BURRUSS, ET AL.

Salmon,
Eyler, Deborah S.,
Meredith,

JJ.

Opinion by Salmon, J.

Filed: October 24, 2006

John Evans is an amateur ("ham") radio afficionado. To pursue his hobby, he negotiated a contract to purchase about forty-four acres of land located at 15110 Sugarland Road, Poolesville, Montgomery County, Maryland. That property is located in the rural density transfer ("RDT") zone. The contract was contingent upon Mr. Evans' being able to obtain a building permit allowing him to construct four 190-foot ham radio towers on the property. The required building permit was issued by Montgomery County on February 20, 2004. Accordingly, on March 5, 2004, Mr. Evans and his wife, Carol (collectively "the Evanses"), purchased the property.

On May 11, 2004, the Evanses filed a revised application for a commercial building permit, seeking, to make some minor technical changes in the project. The revised permit (No. 344132) was issued by Montgomery County on June 23, 2004.

Thomas Burruss and his wife, Judith ("the Burrusses") live on property adjacent to the land purchased by the Evanses. Alan Ganoux ("Ganoux") lives across Sugarland Road from the Evanses' property.

On August 5, 2004, the Evanses commenced construction of the four radio towers. This was the first notice that the Burrusses or Ganoux had that a building permit had been issued to the Evanses.

The Burrusses and Ganoux were displeased when they learned that radio towers were to be erected near their properties. They retained counsel

in an effort to stop the construction of the towers. Their counsel wrote to the Montgomery County Department of Permitting Services ("DPS") on August 13, 2004, requesting that DPS issue a stop-work order. Initially DPS declined to do so. But, on August 27, 2004, DPS issued a stop-work order until the Evanses obtained a sediment control permit.

The Burrusses and Ganoux, on August 30, 2004, filed an administrative appeal with the Board of Appeals for Montgomery County, Maryland ("the Board"), appealing the issuance to the Evanses of the two building permits (Case No. A-6020). The substantive basis for the appeal in Case No. A-6020 was that, purportedly, the Evanses were required to obtain a special exception before erecting the amateur radio towers, yet no such special exception had been granted.[25] On

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[25] The Evanses contend that no special exception was required. They point out (accurately) that Section 59-C-9.3 of the Montgomery County zoning statute, which is entitled "Land Use," permits an "amateur radio facility" in a RDT zone. A footnote to the pertinent provision of Section 59-C-9.3 reads:

> [The radio tower] [m]ust not exceed 65 feet in height; however, a special exception for additional height may be granted, by the Board of Appeals if it can be demonstrated that the additional height is the minimum needed to engage in amateur radio communications under a license issued by the Federal Communications Commission. Any amateur facility

September 22, 2004, the Evanses filed a motion to dismiss Case No. A-6020 on the ground that the appeal was untimely. One week later, Montgomery County, Maryland ("the County"), joined in the motion to dismiss.

Meanwhile, on September 10, 2004, Montgomery County issued a sediment control permit to the Evanses and lifted the stop-work order. Twenty days after the issuance of the sediment control permit, the Burrusses and Ganoux filed a second appeal with the Board challenging the issuance of the sediment control permit and the county's purported "renewal" of the existing building permits (Case No. A-6029).

The County and the Evanses filed motions to dismiss the second appeal on the ground that there existed no statutory authority to appeal a determination made relating to whether a sediment control permit should be issued.

The Board then consolidated the two appeals and heard argument concerning the motions to dismiss on November 10, 2004.

In an opinion dated March 29, 2005, the Board dismissed the two appeals after finding that the

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existing before December 26, 2005 that exceeds 65 feet in height is a conforming structure.

At the hearing before the Board, which occurred in November 2004, it was developed that the four towers at issue had already been erected as of that date.

appeal of the issuance of the building permits was untimely and that there was no statutory basis for an appeal from the issuance of a sediment control permit.

The Burrusses and Ganoux filed a petition for judicial review in the Circuit Court for Montgomery County. After hearing oral argument, the circuit court (1) affirmed the Board's finding that Case No. A-6020 was not timely filed; (2) ruled that the Board erred in dismissing the second appeal (Case No. A-6029) because, in the court's view, the building permits were "renewed" when the sediment control permit was issued on September- 10, 2004, and therefore the petitioners had filed their appeal within thirty days of that renewal; (3) concluded that in light of the fact that the second appeal was timely filed, the court need not consider petitioners' argument that there was an infringement of their rights to due process of law brought about by the statutory requirement that an appeal be filed within thirty days of the issuance of a permit, even when they had no notice of the permit's issuance; and (4) remanded the case to the Board for a hearing concerning whether the building permits should have been issued.

The Evanses filed a notice of appeal to this Court and raise three issues:

> 1. Whether the [c]ircuit [c]ourt was correct in upholding the Board of Appeals' determination that the appeal of the building permits was untimely.

2. Whether the [c]ircuit [c]ourt erred in failing to defer to the Board of Appeals' determination that the issuance of a sediment control permit neither invalidated nor "renewed" the existing building permits.
3. Whether the [c]ircuit [c]ourt erred in finding that securing a sediment control permit was required in all circumstances prior to the issuance of a building permit.

I

A. Standard of Review

In reviewing the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." The scope of our review of administrative agency action is narrow and we are "not to substitute [our] judgment for the expertise of those persons who constitute the administrative agency." Accordingly, this Court is tasked with "'determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'"

> With regard, to questions of fact, we will only disturb the decision of an administrative agency if "a reasoning mind reasonably could [not] have reached the factual conclusion the agency reached." Thus, "[a] reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record."

Days Cove Reclamation Co. v. Queen Anne's County, 146 Md. App. 469, 484-85, *cert*, *denied*, 372 Md. 431 (2002)(citations omitted).

We may "uphold the decision of the Board only 'on the basis of the agency's reasons and findings.'" *Umerley v. People's Counsel of Baltimore County*, 108 Md. App. 497, 504, *cert*, *denied*, 342 Md. 584 (1996)(citation omitted). In reviewing the Board's rationale for its decision, "the expertise of the agency in its own field should be respected[.]" *Marzullo v. Kahl*, 366 Md. 158, 172 (2001). Consequently, on "some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Id.* at 173. The Board's "presumed expertise in interpreting the [zoning regulations], developed over the . . . years, is what gives weight to appropriate deference in our analysis of its legal reasoning[.]" *Id.* at 173 n 11.

B. <u>Issue No. 1</u>

The Board and the circuit court agreed that there was no statutory requirement that notice be given to anyone when the County issues a building permit for construction in a RDT zone. In this appeal, the Burrusses and Ganoux do not take issue with this ruling — although they took a contrary position before both the Board and the circuit court.[26]

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[26] The position of the Burrusses and Ganoux, when they appeared before the Board and the circuit court, was that Section 8-25 (A) (a) of the Montgomery County Code required the Evanses to give them notice. Section 8-25(A)(a) provides:

> If a permit is issued under Section 8-25 of new construction *on vacant residentially zoned land or construction that would affect the footprint of height of any existing structure located on residentially zoned land,* the Director must promptly require the recipient to post on the lot *a conspicuous sign* describing the proposed construction; specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a).

The Board and the circuit court rejected the position of the Burrusses and Ganoux, *inter alia,* because Section 8-25(A)(a) governs notice requirements for construction on residentially zoned property and could not be applied to the land owned by the Evanses,

Section 8-23(a) of the Montgomery County Code provides:

> Any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department [of Permitting Services] under this Chapter [Buildings] may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued.

Before the Board, the Burrusses and Ganoux (hereafter "the protestants") contended that the thirty days mentioned in Section 8-23(a) only commenced to run once the aggrieved party had notice that a building permit was issued. The Board, relying on *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 579-80 (1994), rejected this contention. In the *United Parcel Service* case, the Court said:

> As previously indicated, the Baltimore County statute authorizing appeals to the Board of Appeals, § 26-132 of the Baltimore County Code, states as follows:
>
> "(a) Any person or persons, jointly or severally, or any taxpayer

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which is zoned RDT.

> aggrieved or feeling aggrieved by any decision or order of the zoning commissioner or the director of zoning administration and development management shall have the right to appeal therefrom to the county board of appeals.
>
> * * * * * *
>
> "Notice of such appeals shall be filed, in writing, with the director within thirty (30) days from date of any final order appealed, together with the required fee as provided in the zoning regulations."

The above-quoted section is not a statute of limitations. Instead, it is a "time for appeal" provision like that set forth in Maryland Rule 8-202(a) ("the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken"). Section 26-132 of the Baltimore County Code, like Rule 8-202(a), specified the time for appealing from a decision by an official or tribunal exercising original jurisdiction to an appellate tribunal within the same governmental framework. A statute of limitations, on the other hand, typically concerns the time for filing an original cause of action, complaint or request.

Like other "time for appeal" provisions, BCC § 26-132 neither contains the word "accrues" nor speaks in terms of accrual. Moreover, there is no language in § 26-132 which could furnish the basis for a flexible doctrine like the discovery rule. Rather, the time for appeal begins to run from a fixed date. In mandatory language, the Baltimore County statute states that a notice of appeal "shall" be filed within thirty days of the decision from which the appeal is taken. Under language like that set forth in BCC § 26-132, this Court has consistently held that, where the notice of appeal was not filed within the prescribed period after the final decision from which the appeal was taken, the appellate tribunal had no authority to decide the case on its merits. *See, e.g., Dabrowski v. Dondalski*, 320 Md. 329, 397-398 . . . (1990); *Walbert v. Walbert*, 310 Md. 657, 662 . . . (1987), and cases there cited.

A case very much on point is *Miller* v. *Pinto*, 305 Md. 396 . . . (1986). In *Miller*, Mr. and Mrs. Pinto received approval from the Kent County Zoning Administrator for their intended use of their property. The Zoning Administrator, in a letter dated August 20, 1982, gave his express approval of the intended use. In April of

> 1983, an adjacent property owner, Mr. Miller, took an appeal to the Board of Appeals from the Zoning Administrator's letter of August 1982. Like BCC § 2 6-132, the Kent County zoning ordinance required that an appeal from the final decision of the Zoning Administrator be taken within 30 days. This Court held that the Kent County Board of Appeals had no appellate jurisdiction over the case, as "the 30-day period had expired long before Miller filed an application for review of the Zoning Administrator's August 1982 letter. . . ." 305 Md. at 405 . . .
>
> Consequently, the Board of Appeals erred in holding that, under the "discovery rule," the Protestants' appeal could be treated as a timely appeal from the 1985 advice and marginal note from the Zoning Commissioner.

Id. at 579-81 (footnote omitted) (emphasis added).

The *United Parcel* case is directly on point. Therefore, we hold that the Board did not err in concluding that the discovery rule was inapplicable to the statute governing time to appeal.

The protestants also argued before the Board and the circuit court that the fact that they were given no notice regarding the proposed construction of the radio towers amounted to a violation of their due process right to notice and an opportunity to be

heard afforded them under Article 24 of the Maryland Constitution and the Fourteenth Amendment to the United States Constitution. More specifically, they maintain: (1) issuance of the building permit denied them a constitutionally protected property right and (2) depriving them of the right to appeal the loss of this property right (when they had no notice of the issuance of the building permit prior to the expiration of thirty days) denied them due process of law. In this regard, the protestants present the following argument in their brief:

> "Land use decisions that affect property rights of adjacent landowners require procedural due process for the adjacent landowners as well as for the applicants," *van't Rood v. County of Santa Clara*, 6 Cal. Rptr. 3d 746, 113 Cal. App. 4th 549, 570, *quoting*, *Cohan v. City of Thousand Oaks*; 30 Cal. App. 4th 547, 558, 35 Cal. Rptr. 2d 782 (1994); *see Feldman v. Star Homes, Inc.*, 199 Md. 1, 6, 84 A.2d 903 (1941) ("We may assume, without deciding, that one whose property rights are affected by an administrative decision may be entitled to be heard on the subject, and the denial of such right may constitute a lack of due process").
>
> Maryland [c]ourts recognize that for purposes of standing to appeal from a Board of Appeals decision, a "person aggrieved" is "one whose personal or

property rights are adversely affected by the decision of the board. . . . An adjoining, confronting or nearby property owner is deemed, prima facie, to be specially damaged and, therefore, a person aggrieved." *Bryniarski* v. *Montgomery County Board of Appeals,* 247 Md. 137, 144-45, 230 A.2d 289 (1967). As adjoining and confronting property owners, Appellees' personal and property rights have been and are being now adversely affected and deprived based upon the issuance of the building permits and the subsequent construction of the four 190 foot radio towers on land immediately adjacent to their own. Appellees' property interests are being impacted in a manner that is different from the public in general, based upon the proximity of their homes to the four 190 foot radio towers. These monstrous towers in the middle of the rural and scenic setting have an adverse impact on Appellees' use and enjoyment of their properties, adversely affect the scenic views from their properties, and negatively affect the value of their properties. As such, Appellees had a due process right to notice of the issuance of the permits, which would have provided them with the opportunity to appeal to the Board within 30 days of the issuance of the permits. Without any such notice, they could not

> possibly comply with the 30 day appeal requirement..

(Footnote omitted.)

The Board rejected the due process argument based on the following rationale:

> [The protestants] next argue that the County's failure to require Mr. Evans to provide them with notice of the building permits violated their due process rights under the Maryland and Federal Constitutions. They cite *Feldman v. Star Homes, Inc.*, 199 Md. 1 . . . (1951), for the proposition that "one whose property rights are affected by an administrative decision may be entitled to be heard on the subject, and the denial of such right may constitute a lack of due process." While this statement undoubtedly remains true, it begs the question — was some property right of the Appellants' affected by the issuance of the building permits? Indeed, in *Feldman,* the [C]ourt concluded that those appellants' property rights were not affected and, accordingly, the city planning commission was not required to provide them notice before passing on a subdivision plan.
>
> [The protestants] have provided no support for the proposition that they have some constitutionally [protected] property right that was

> affected by the issuance of the building permits to their neighbor. And in this case, the Board declines to find one.
>
> Appellants cite *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137 . . . (1967), for the proposition that adjoining, confronting, or nearby property owners are, prima facie, deemed to be persons aggrieved for purposes for appealing a Board decision to the circuit court. (They must also have been a party to the proceeding before the Board.) But this merely establishes the [protestants'] right to timely appeal the issuance of the building permits under § 8-23(a); it does not establish any constitutionally protected property interest requiring notice and it does not excuse their untimely appeal.

(Footnote omitted.)

We cannot affirm the Board's decision concerning the due process issue on the grounds advanced by the Board, i.e., that the Burrusses and Ganoux had "provided no support for the proposition that they have some constitutionally protected property right that was affected by the issuance of the building permits . . . ."[27] Although it is true that the

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[27] In an appeal from the circuit court's review of an agency decision, this Court's role is "precisely the same as that of the circuit court." *Ahalt* v. *Montgomery County*, 113 Md. App.' 14, 20 (1996). We review the Board's decision — not the decision of the circuit court. This Court neither makes its own factual findings,

protestants provided no support for their contention that the issuance of the building permits affected their property rights, they were given no opportunity before the Board to produce such evidence.

At the hearing, counsel for the Burrusses and Ganoux said: " [A]t this point, we would like to introduce testimony on the issue of the . . . deprivation of property." The Board chairman, Allison Fultz, counsel for the protestants, and the County then engaged in the following colloquy:

> MS. FULTZ: The Board isn't going to take any testimony on the merits, frankly, until we've decided the procedural and jurisdictional issues of the motion. So, should we go forward, that would certainly be part of what we would take up in the hearing.
>
> MR. PARSONS [COUNSEL FOR THE PROTESTANTS]: I'm not talking about the merits. I'm talking about the issue of, the fact that they did not [give] notice. And we have a stipulation here, I don't know, that my clients, in fact, did not have any notice of the issuance of this permit until August 5, 2 004. I think we –

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see Board of County Comm'rs v. Holbrook, 314 Md. 210, 218 (1988), nor may it supply facts that were not relied upon by the agency in reaching its decision. *See United Steelworkers of America, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984). Instead, the administrative decision will be upheld only if "it is sustainable on the agency's findings and for the reasons stated by the agency." *Id.*

> MS. FULTZ: I'm not hearing the County argue that there was notice because the County's arguing that there was no notice requirement.
>
> MR. SPICER [COUNSEL FOR THE COUNTY]: I'm just saying it doesn't really matter.
>
> MR. PARSONS: I think we need to –
>
> MR. SPICER: I have no way of knowing.
>
> MR. PARSONS: — provide testimony on that. I will make a proffer, and I need to hear from the Board as to whether or not I'll be permitted. What I would proffer to you is that we would introduce testimony to show that there was no notice provided. Actually they received no notice of this until August 5, 2004, and on the issue of the deprivation of their property interests. That these towers are adversely affecting their use and enjoyment of their property and negatively affecting the value of their property.

(Emphasis added.)

Despite Chairman Fultz's statement that it was beyond the Board's jurisdiction to decide if the

protestants' property rights were "implicated" by the issuance if the permits, the Board, in its written opinion, decided that very issue.

We cannot decide the correctness, *vel non* of the Board's finding that the protestants had no property rights adversely affected by the grant of the permits when the Board prohibited the protestants from proving that some property rights of theirs were affected. For that reason, we shall remand this case to the Board in order for that administrative body to determine, after hearing evidence, whether the protestants were deprived of a constitutionally protected property right by the issuance, without notice to them, of the construction permits. If such a deprivation is shown, the Board should decide the merits of Appeal No. A-6020.[28]

In their reply brief, the Evanses contend that it was improper for the appellees to raise in their brief the question of whether the Board erred when it ruled on the due process issue. The Evanses assert that they did not raise the issue of due process in [their opening brief] in part because the circuit court did not pass upon it." Citing *Walston v. Sun Cab Company, Inc.*, 267 Md. 559, 564 (1973), appellant asserts that the appellees violated the well-established

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[28] As mentioned earlier, in Appeal No. A-6020 the Burrusses and Ganoux contended that the permits were issued in error because a special exception was needed to build such towers in a RDT zone. But at the hearing before the Board, the protestants attempted to expand the basis for their appeal by asserting that the Evanses, pursuant to Section 50-20 of the Montgomery County Code, should have gone through the subdivision process prior to the issuance of the permits. We shall not decide whether such an expansion of the grounds for appeal is proper.

rule that "an appellee who does not file a cross-appeal cannot urge before [an appellate court] matters not within or related to the issue raised by appellant."

The short answer to the above contention is that the appellants in their opening brief did raise an issue directly-relevant to the question of whether the Board correctly decided the due process issue. Under the first issue presented in appellants' brief, appellants argued that the Board correctly decided that the first appeal was untimely. Appellants overlook the fact that one of the cornerstones of the Board's ruling that the appeal was untimely was that the protestants did not have a constitutionally protected property right to notice of the issuance of the construction permits. Therefore, it was legitimate for appellees to raise that issue in their brief.[29]

II.

The circuit court did not address the due process issue because, in its view, the appeal of the "renewal" of the permit was timely filed, i.e., the appeal was filed within thirty days of the date the building permits were "renewed." The Evanses contend

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[29] Maryland Rule 8-131 (a) provides that, except for certain jurisdictional issues, an appellate court "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." (Emphasis added.) The due process issue plainly was raised in the trial court, and thus nothing in Maryland Rule 8-131 (a) prohibits our review of that issue. The Evanses argued to the contrary and stress that the issue was not decided below. This argument overlooks the fact that the prohibition contained in Maryland Rule 8-131(a) in no way prevents us from deciding issues raised in the circuit court but not decided by the lower court.

that the permit was never renewed, and therefore the thirty-day clock for filing an appeal was never restarted. We agree with the Evanses.

In its memorandum opinion the circuit ourt said, in relevant part, the following:

> Petitioners[']contention that DPS's issuance of the sediment control permit, and lifting of the stop work order, acted to renew the building permits. Because [p]etitioners filed the appeal of the issuance of the sediment control permit and subsequent renewal of the building permits (Case No. A-6029) on September 30, 2004, it was timely filed regarding the September 10, 2004 [,] renewal. Therefore, this Court holds that the Board erred in dismissing A-6029 in its entirety, because the appeal of the building permit renewal was timely filed. Therefore, this Court remands Case No. A-6029 for a hearing regarding the building permits, but not the sediment control permit.

Section 8-26(i)(l) reads as follows:

> *Compliance with excavation, grading and sediment control regulations.*

(1) Unless the construction is exempted by Chapter 19, an applicant for a building permit must obtain a sediment control permit before the building permit is issued.

(2) If a sediment control permit is suspended or revoked, the building permit for construction within the area subject to the sediment control permit may be suspended or revoked.

(3) All work shall conform to plans approved and/or permits issued in accordance with Chapter 19 of this Code.

Included in Chapter 19. of the Montgomery County Code is Section 19-2(c), which provides:

> A permit is not required under this chapter for the following: (1) A minor land disturbance activity that: (a) Is not associated with construction of a new residential or commercial building; (b) Involves less than 100 cubic yards of earth

> movement; (c) Disturbs less than 5,000 square feet of surface area; and (d) Is properly stabilized to prevent erosion and sedimentation.

The circuit court reading of Section 8-26(i)(1) was in complete accord with what the protestants said when they filed, before the Board, their opposition to the Evanses' motion to dismiss appeal. The protestants argued in their memorandum filed with the Board:

> The County argues that a "renewal" of the building permit "never took place." However, under Section 8-26(i)(1) of the County Code, "an applicant for a building permit must obtain a sediment control permit before the building permit is issued." . . . The word "must" clearly demonstrates that obtaining the building permit before the sediment control permit is a mandatory sequence of events. The building permits that are the subject of these appeals were issued before the sediment control permits were issued in violation of the Code. Therefore, the building permits previously issued were invalid, and they are of no force and effect until a new permit is issued. . . .

In his argument before the Board, counsel for the protestants never once mentioned the exception set

forth in Chapter 19. In other words, counsel maintained that before any building permit could be issued, a sediment control permit was always needed. A representative example of what counsel for the protestants argued before the Board was the following:

> [Our argument] is based upon the fact that the Code specifically says that the sediment control permit must be issued before the building permit. So that you have a clear violation of the law as to that building permit. The violation of that section, it doesn't become final until compliance has been achieved with that section.

The protestants now argue that

> there is no dispute that f the . Evanses' J project was ultimately not exempted by Chapter 19 because [the Evanses, were] required to obtain the sediment control permit. By issuing the stop-work order based upon the failure to obtain the sediment control permit, DPS acknowledged that the statutorily imposed sequence of events was out of order.

It is not true that DPS acknowledged that the statutorily imposed sequence (i.e., the alleged sequence that a sediment control permit must always be issued before a building permit) was not followed. There was no proffer by the protestants before the Board or even an argument made to that

body that the, issuance of the stop-work order was based upon the Evanses' failure to obtain the sediment control permit before it obtained the building permit. This was pointed out by the Board when it said in its written opinion: "It is not at all clear that the County issued the stop work order because Mr. Evans failed to obtain a sediment control permit before he obtained his building permit." From all that appears in the record presented to the Board, it may have appeared to DPS when the building permit was issued that the anticipated land disturbance did not meet the threshold requirement set forth in Chapter 19, and as a consequence, it initially concluded that a sediment control permit was not needed; later, however, it may well have been that once construction commenced circumstances changed at the construction site, and it was determined that a sediment control permit was needed.

Moreover, even if we were to assume, *arguendo,* that the Evanses were required to have a sediment control permit as a condition precedent to the issuance of a building permit, it does not follow that once the Evanses obtained the sediment control permit the building permits were "renewed" as appellees now contend. No provision of the Montgomery County Code provides for the "renewal" of a building permit, although the Code does allow the DPS to grant a six-month extension of a building permit under certain enumerated circumstances. See 8-25(b)(3).

The. protestants hold a contrary view and point to Section 8-23(a) of the Montgomery

County Code. They emphasize two words in that section, viz.:

> Any person aggrieved by the issuance, denial, renewal, or revocation of a.permit or any other decision or order of the Department [of Permitting Services] under this Chapter [Buildings] may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued.

{Emphasis added.)

As pointed out by the Evanses, this provision of the Code simply allows for the appeal to the Board of the renewal of "a permit"; it does not say or in any way suggest that a building permit may be renewed.

The protestants also argue that

> the building permits were "null and void" until the sediment control permits was [sic] issued, and the refusal by the County to issue a new permit [as protestants asked the County to do] after the sediment control permit was issued, thereby implicitly renewing or reissuing the building permit, is also a decision that is subject to an administrative appeal.

The trouble with this argument is that there is nothing in the record to support the contention that the original building permits were, in fact, null and void. The protestants never either presented or proffered evidence to show that the exceptions mentioned in Chapter 19 were inapplicable; instead, in presenting their case to the Board, the protestants ignored the exceptions.

For the reasons stated above, we reverse the portion of the circuit court's opinion in which it held that Appeal No. A-6029 was timely filed because it was filed within thirty days of the time that the permit was "renewed. " The building permits in this case were never renewed, nor does anything in the Montgomery County Code permit renewal.

We shall, however, remand the case to the Board of Appeals - as the circuit court did - albeit for different reasons. Upon remand, the circuit court should direct the Board to receive evidence from the appellees concerning the issue of whether their

property rights were infringed by the issuance of the building permit to the Evanses. If the Board finds that the protestants have property rights that were infringed upon by the issuance of the building permit without notice, the Board should then consider the merits of Appeal No. A-6020.

JUDGMENT OF THE CIRCUIT COURT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY WITH INSTRUCTIONS TO REMAND THE CASE TO THE BOARD OF APPEALS FOR FURTHER PROCEEDINGS IN CONFORMITY WITH THE VIEWS EXPRESSED IN THIS OPINION; COSTS TO BE DIVIDED EVENLY BETWEEN THE APPELLANTS AND THE APPELLEES.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JUDITH AND THOMAS BURRESS; AND ALAN GAUNOUX	:
	: **RECEIVED**
Petitioners	
	: **OCT 13**
	: **2005**
vs.	:
	: **Civil Case**
BOARD OF APPEALS FOR MONTGOMERY COUNTY, MARYLAND AND JOHN EVANS	: **No. 260494**
	:
	:
	:
Respondent	

MEMORANDUM OPINION

This matter came before the Court for judicial review of the decision of the Board of Appeals for Montgomery County, Maryland ("Board") in Case Nos. A-6020 and A-6029. On November 10, 2004, the Board held a hearing on the appeals in which Petitioners participated as well as Respondents, Montgomery County and Mr. John Evans, owner the of the property in dispute. The Board dismissed A-6020 because the building permit appeal was untimely and dismissed A-6029 because there is no statutory provision for an appeal of the issuance of a sediment control permit.

Background

Mr. John Evans, an amateur (or ham) radio enthusiast, purchased property at 15110 Sugarland Road, Poolesville, Maryland for the purpose of building a large scale amateur radio operation facility. The property is zoned RDT (Rural Density Transfer), which is one of the county's six agricultural zones established by the Montgomery County Zoning Ordinance, Chapter 59, Division 59-C-9. Mr. Evans' contract to purchase the property was contingent on his ability to secure a permit to build four 190-foot radio towers. The Montgomery County Department of Permitting Services ("DPS") issued Mr. Evans building permit no. 330255 on February 20, 2004. He subsequently purchased the property on or about March 5, 2004. Mr. Evans made revisions to his construction methods and was issued revised permit no. 344132 by DPS on June 23, 2004. Both permits referred to the structures being constructed, or altered, as "commercial miscellaneous structures." DPS did not require Mr. Evans to post any notice with regard to the construction.

Petitioners, neighboring property owners, had no notice of the impending construction until August 5, 2004, when construction equipment appeared on Mr. Evans' property. Upon inquiry, Petitioners learned that Mr. Evans intended to construct four 190-foot radio towers. Petitioners retained counsel who wrote to the County on August 13, 2004, requesting that it issue a stop work order. By letter dated August 27, 2004, the County declined to issue a stop work order as to the building permits, but noted

that it had issued one pending Mr. Evans securing a sediment control permit for "a small land disturbance." On August 30, 2004, Petitioners filed an appeal of the decisions to issue the two building permits (Case No. A-6020) on the basis that the Zoning Ordinance provides that radio towers are authorized in RDT zones by special exception only, and no special exception was granted. The County issued a sediment control permit (no. 213971) on September 10, 2004 (on or about this same date the County lifted the stop work order allowing Mr. Evans to resume construction of the towers). On September 30, 2004, Petitioners filed their appeal to the issuance of the sediment control permit and renewal of the two building permits (Case No. A-6029).

Petitioners filed a timely petition for review and presented the following issues for this Court's review.

1. Whether Petitioners were entitled to notice of the issuance of the build permits.

2. Whether petitions were timely filed.

3. Whether the absence of notice is violative of the Petitioners' rights to due process.

For the reasons set forth below, the case shall be remanded to the Board of Appeals for a full hearing on the merits.

Discussion

A. Scope of Review

The Court's statutory role upon review of a decision of an agency goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary, or capricious administrative action. *Hurl v. Board of Educ,* 107 Md. App. 286, 667 A.2d 970 (1995), citing *Hartford Mem. Hosp. v. Health Servs, Cost Review Comm'n,* 44 Md. App. 489, 410 A.2d 22 (1980). When an appeal is heard on the record from a decision of an administrative agency, the Circuit Court is required to review the case on both the law and the evidence. *Trovers* v. *Baltimore Police Dep't,* 115 Md. App. 395, 693 A.2d 378 (1997), citing *Commissioner, Baltimore City Police Dep't v. Cason,* 34 Md. App. 487, 368 A.2d 1067, *cert. denied,* 280 Md. 728 (1977).

The standard of review is whether a reasoning mind could have reached the same conclusion as the administrative agency. *Travers,* 115 Md. App. at 33, 693 A.2d at 420. The burden is on those who seek to set aside an agency decision on appeal to show by clear and satisfactory evidence that there is illegality or unreasonableness. *Office of People's Counsel* v. *Maryland Public Serv. Comm'n,* 355 Md. 1, 32, 733 A.2d 996, 1012 (1999), citing *Baltimore Gas & Elec. Co. v. McQuaid,* 220 Md. 373, 152 A.2d 825 (1959).

Moreover, the reviewing court should uphold the agency's decision if it is sustainable on the agency's findings and for the reasons stated by the agency. *United Parcel Serv., Inc.* v. *People's Counsel,* 336 Md. 569, 577, 650 A.2d 226 (1994) (citations omitted); *Harford County v. Preston,* 322 Md. 493,

505, 588 A.2d 722 (1991). As part of its review, a reviewing court must determine whether an administrative agency made an error of law. *Baltimore Lutheran High School v. Employment Sec. Admin.*, 302 Md. 649, 662, 490 A.2d 701, 708 (1985). Unless based on an erroneous interpretation of law, the order of an administrative agency must be upheld. *Montgomery County, Maryland v, Buckman,* 333 Md. 516, 520 fn.l, 636 A.2d 448,450, fn.l (1993).

B. Issues presented for judicial review.

1. Whether Petitioners were entitled to notice of the issuance of the building permits.

Petitioners argue that Zoning Ordinance § 8-25A(a) applies to the building permits issued to Mr. Evans. While they agree that Mr. Evans' property is not residentiaily zoned (but rather in a RDT zone) and that the radio towers do not "affect the footprint or height of any existing structure," they contend that DPS has applied the conspicuous posting requirement of § 8-25A(a) to swimming pools, therefore, it should be applied to Mr. Evans' radio towers.

Respondents contend that there is no legal requirement that notice be given when a building permit has been issued for construction in a RDT zone. They maintain that the language of § 8-25A(a) is clear on its face: It requires conspicuous posting of building permits on residential land only (and then only for certain types of construction). They assert that the erroneous conspicuous posting of a building

permit for a swimming pool does not change the plain language of § 8-25A(a). Moreover, Respondents maintain that § 8-25A(a) does not require notice of any kind; it merely requires a posting.

> Section 8-25A(a) states:
>
> "If a permit is issued under Section 8-25 for new construction on vacant residentiaily zoned land or construction that would affect the footprint or height of any existing structure located on residentiaily zoned land, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a)."

This section was clearly meant to apply only to construction on vacant *residentially* zoned land or construction of existing structures on *residentially* zoned land. It is undisputed that building permit nos. 330255 and 344132 were issued approving construction on *agriculturally* zoned land (specifically, a RDT zone), not residentially zoned land. Thus, this Court cannot find that the Board

erred in concluding that Mr. Evans was not required to provide conspicuous notice under § 8-25A(a),

2. Whether petitions were timely filed.

Petitioners contend that Case No. A-6020 (the appeal of the original issuance of the building permits because no special exception was granted) was timely filed because it was filed within 30 days of their *actual notice* of the construction and thus, within 30 days of the issuance of the building permits. Petitioners assert that if the law were interpreted as Respondents argue it should be, then an aggrieved property owner would have 30 days in which to file an appeal to a permit of which they have no notice, and therefore, no knowledge. In effect, there would be no administrative remedy.

Petitioners argue that Case No. A-6029 (the appeal of the sediment control permit and renewal of the building permits) was timely filed concerning the sediment control permit because it was issued September 10, 2005, and they filed the appeal September 30, 2005. Furthermore, because § 8-26(i)(1) requires the issuance of a sediment control permit before a building permit issued, they contend that the issuance of the sediment control permit renewed the building permits; therefore, Case No. A-6029 was timely filed with reference to the building permits because it was filed within 30 days of the renewal.

Respondents assert that Case No. A-6029 was properly dismissed because Petitioners' appeals were not timely filed because they were not filed within 30 days of the date of *issuance* of the building permits

as required by § 8-23. They also rely on the *Appeal of Joselyn Wells,* Case No. A-5819, in which the Board found that there is no statutory authority in Chapter 19 to appeal a sediment control permit, and that the provisions of § 2-112 do not provide for the Board of Appeals to have jurisdiction to hear an appeal of a sediment control permit.

Section 8-26(i)(1) states that, "unless the construction is exempted by Chapter 19, an applicant for a building permit *must* obtain a sediment control permit before the building permit is issued."(emphasis added). Section 8-23(a) states:

> "Any person aggrieved by the issuance, denial, *renewal,* or revocation of a permit or any other decision or order of the Department under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, *renewed,* or revoked, or the order or decision is issued." (emphasis added)

Permit no. 330255 was issued to Mr. Evans February 20, 2004 and permit no. 344132 for revision was issued June 23, 2004. Petitioners filed their appeal of the building permits on August 30, 2004 (Case No. A-6020). Therefore, this Court affirms the Board's finding that Petitioners did not timely file Case No. A-6020 and properly dismissed that appeal.

As the Board found in the *Appeal of Joselyn Wells,* it has no jurisdiction to hear an appeal of a sediment control permit, nor do Article II and III of Chapter 19 of the Maryland Code refer to any right of

appeal of a sediment control permit. Therefore, this Court holds that the Board did not err in finding that it does not have jurisdiction over, nor is there a right of appeal of, a sediment control permit.

This Court finds, however, that Section 8-26(i)(l) *requires* the issuance of a sediment control permit before a valid building permit can be issued. Therefore, we agree with Petitioners contention that DPS's issuance of the sediment control permit, and lifting of the stop work order, acted to renew the building permits. Because Petitioners filed the appeal of the issuance of the sediment control permit and subsequent renewal of the building permits (Case No. A-6029) on September 30, 2004, it was timely filed regarding the September 10, 2004 renewal. Therefore, this Court holds that the Board erred in dismissing A-6029 in its entirety, because the appeal of the building permit renewal was timely filed. Therefore, this Court remands Case No. A-6029 for a hearing regarding the building permits, but not the sediment control permit.

3. Whether the absence of notice is violative of the Petitioners' rights to due process.

Because this Court is remanding the case for a hearing, based on our finding that the Board erred when it dismissed A-6029, this Court does not address the issue of whether an absence of notice is a violation of Petitioners' rights to Due Process.

/s/

LOUISE G. SCRIVENER
Judge, Circuit Court for
Montgomery County, Maryland
Date: 10/12/05

Copies to: James L. Parsons, Jr., Esquire
Steven Van Grack, Esquire
Malcolm F. Spicer, Jr., Esquire

Copies Mailed: Oct. 12, 2005

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JUDITH AND THOMAS BURRESS; AND ALAN GAUNOUX	:	
Petitioners	:	
vs.	:	**Civil Case No. 260494**
BOARD OF APPEALS FOR MONTGOMERY COUNTY, MARYLAND AND JOHN EVANS	:	
Respondent	:	

ORDER

This matter came before the Court for judicial review of the decision of the Board of Appeals for Montgomery County, Maryland ("Board") in Case Nos. A-6020 and A-6029. Based upon the court's review of the record in this case, a review of the applicable law, a consideration of the arguments of counsel at the hearing, and for the reasons set forth in the Memorandum Opinion filed concurrently herewith, it is thereupon this 7th day of October 2005, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that Case No. A-6029 is hereby REMANDED to the Board of Appeals for Montgomery County, Maryland for a hearing on the appeal of the issuance of the building permits.

/s/

LOUISE G. SCRIVENER
Judge, Circuit Court for
Montgomery County, Maryland

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue Rockville, Maryland 20850
(240)777-6600
www.montgomerycountymd.gov/content/council/boa/board.asp

Case Nos. A-6020 and A-6029

APPEAL OF JUDITH AND THOMAS BURRUSS; ALAN GAUNOUX

OPINION OF THE BOARD
(Opinion Adopted: November 10, 2004
(Effective Date of Opinion: March 29, 2005)

Judith and Thomas Burruss and Alan Gaunoux ("Appellants") filed these administrative appeals from building permits (Case no. A-6020) and a sediment control permit (Case no. A-6029) issued by the Montgomery County Department of Permitting Services to John Evans for the construction of 4 190-foot amateur radio towers on his property. The Board consolidated the appeals and granted Mr. Evans' motion to intervene. The Board held a hearing on the appeals on November 10, 2004. Malcolm Spicer, Esquire appeared on behalf of Montgomery County. Steven Van Grack, Esquire appeared on behalf of John Evans. James L. Parsons, Esquire appeared on behalf of the Appellants. Pending before the Board were motions to dismiss filed by the County and Mr. Evans. The Board will

grant the motions to dismiss because the building permit appeal is untimely and there is no provision allowing this Board to entertain an appeal from the issuance of a sediment control permit.

FINDINGS OF FACT

The basic facts in this case are undisputed. The Evans' property is located in the RDT (rural density transfer) zone. On February 20, 2004, Mr. Evans received a building permit (no. 330255) to construct four 190-foot amateur radio towers on his property in Poolesville, Maryland.[30] On June 23, 2004, Mr. Evans received a revised building permit (no. 344132) to reflect a change in the guying system and in order to make the towers "rotable."

Construction on site began on or about August 5, 2004. Appellants, who were previously unaware of Mr. Evan's building permits, obtained counsel who, in turn, wrote to the County on August 13, 2004, asking that it issue a stop work order. By letter dated August 27, 2004, the County declined to issue a stop work order as to the building permits, although it did note that it had issued a stop work order on site pending final action on Mr. Evans' pending application for a sediment control permit for "a small land disturbance."

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[30] Mr. Evans was actually the contract purchaser of the property at the time he obtained the initial building permit. Mr. and Mrs. Evans purchased the property two weeks later, on or about March 5, 2004. Their purchase contract was contingent upon receipt of a permit for the radio towers.

On August 30, 2004, the Appellants filed this appeal from the issuance of the building permits.[31] On September 10, 2004, the County issued Mr. Evans a sediment control permit (no. 213971) and the Appellants noted their appeal from that decision on September 30, 2004.

THE MOTION TO DISMISS THE BUILDING PERMITS APPEAL

The County and Mr. Evans ask the Board to dismiss the appeal from the building permits because it was not filed within 30 days of issuance as required by § 8-23(a).[32] They note, quite correctly, that this Board lacks jurisdiction to entertain an untimely appeal. *National Institutes of Health v. Hawk,* 47 Md, App. 189, 422 A.2d 55 (1980), *cert. denied,* 289 Md. 738 (1981).

Appellants argue that Mr. Evans failed to provide the proper notice as required by § 8-25A(a)

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[31] Appellants also filed a civil action in the Circuit Court for Montgomery County (case no. 254316)

[32] Section 8-23(a) provides: "Any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department [of Permitting Services] under this Chapter [Buildings] may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued."

by conspicuously posting his property.[33] That section provides:

If a permit is issued under Section 8-25 for **new construction on vacant residentially zoned land or construction that would affect the footprint or height of any existing structure located on residentially zoned land,** the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a). (Emphasis added.)

The Board concludes that Mr. Evans was not required to provide notice under § 8-25A(a). That section is inapplicable because the building permits were not issued for residentially zoned land *(i.e.,* §§ 59-C-1, 59-C-2, 59-C-3), but for land in the RDT zone, an agricultural zone established in § 59-C-9.1. Even if Mr. Evans' property were in a residential zone, this section still would not apply because the permits were not for new construction on vacant land or construction that would affect the footprint or

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[33] The building permits state, in bold capital lettering, that they **"Must Be Posted On Job Site."** Although there is nothing in the record, Mr. Evans presumably met this requirement by posting a copy of the building permit at or near the towers. The conspicuous posting requirement of § 8-25A(a), which Appellants would have the Board apply, would require something more.

height of an existing structure.[34] Finally, the allegation that a zoning permit technician may have required one of the Appellants to follow this notice provision when constructing a swimming pool on his property in the RDT zone does not alter the plain meaning of § 8-25A(a).

Neither can Appellants seek refuge in the so-called "discovery rule." That rule is a principle of statutory construction and application, which is employed to determine when a cause of action has accrued within the meaning of that term in a statute of limitations. But this rule has no place in a "time for appeal" provision like § 8-23(a), which is the Board's only basis of jurisdiction in this case. *United Parcel Service, Inc. v. People's Counsel for Baltimore County,* 336 Md. 569, 579-80, 650 A.2d 226, 231 (1994).

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[34] Appellants also seek to distinguish *Hawk* because that case did not involve a failure to provide notice. Whatever the effect of failing to provide statutory required notice, *compare Baker v. MontgomeryCounty Council, 241 Md. 178, 215 A.2d 831 (1966)* (where zoning ordinance provision mandated notice through posting of property by erection of signs at designated locations, more than substantial compliance is required) *with Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965)* (technical irregularities (here, failure to list all owners of property) in filing of a zoning application not amounting to a jurisdictional defect does not impair the proceeding or affect the validity of the decision), it is clear that notice was **not** required in this case.

Appellants next argue that the County's failure to require Mr. Evans to provide them with notice of the building permits violated their *due* process rights under the Maryland and Federal Constitutions. They cite *Feldman v. Star Homes, Inc.*, 199 Md. 1, 84 A.2d 903 (1951) for the proposition that "one whose property rights are affected by an administrative decision may be entitled to be heard on the subject, and the denial of such right may constitute a lack of due process."[35] While this statement undoubtedly remains true, it begs the question—was some property right of the Appellants' affected by the issuance of the building permits? Indeed, in *Feldman,* the court concluded that those appellants' property rights were not affected and, accordingly, the city planning commission was not required to provide them notice before passing on a subdivision plan.

Appellants have provided no support for the proposition that they have some constitutionally property right that was affected by the issuance of the building permits to their neighbor. And in this case, the Board declines to find one.

Appellants cite *Bryniarski, v. Montgomery County Board of Appeals,* 247 Md. 137, 230 A.2d 289 (1967) for the proposition that adjoining, confronting, or nearby property owners are, prima facie, deemed to be persons aggrieved for purposes for appealing a Board decision to the circuit court. (They must also have been a party to the proceeding before the

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[35] To similar effect is *Rood* v. *County of Santa Clara,* 6 Cal. Rptr. 3d 746, 113 Cal. App. 4th 549 (2003).

Board.) But this merely establishes the Appellants' right to timely appeal the issuance of the building permits under § 8-23(a); it does not establish any constitutionally protected property interest requiring notice and it does not excuse their untimely appeal.

Finally, Appellants assert that the issuance of the sediment control permit somehow operated as a "renewal" or "re-issuance" of the building permits and, therefore, their appeal is timely. This argument is based upon § 8-26(i)(1) which states that "unless the construction is exempted by Chapter 19, an applicant for a building permit must obtain a sediment control permit before the building permit is issued." In his motion to dismiss, Mr. Evans represents that there was a disagreement among the County inspectors whether he needed to obtain a sediment control permit. On August 14, 2004, Mr. Evans applied for a sediment control permit which he received on September 10, 2004.

The Board does not agree that the sediment control permit operated as a "renewal" or "re-issuance" of the building permits. Assuming Appellants are correct in their reading of § 8-26(i)(1), and that the County erroneously issued the building permits before it issued the sediment control permit, that could have been the basis of an appeal of those building permits. But it does not follow that those permits are void *ab initio,* as Appellants suggest. While the County did issue **a stop work order** and require Mr. Evans to obtain a sediment control permit, it did not **revoke** the underlying building permits or require Mr. Evans to reapply for

a new building permit.[36] See *United Parcel Service, Inc. v. Baltimore County,* 336 Md. 569, 650 A.2d 226 (1994) (zoning commissioner's letter reaffirming earlier issuance of building permits does not give rise to new appeal rights from issuance of building permits).

THE MOTION TO DISMISS THE SEDIMENT CONTROL PERMIT APPEAL

Appellants also seek to challenge Mr. Evans' sediment control permit. But, as this Board has previously stated, the County Code does not provide an appeal from the issuance of a sediment control permit. We readopt the reasoning of our prior decision on the issue in *Appeal of Joseiyn Wells,* Case No. A-5819 (Jan. 30, 2003).

CONCLUSION OF LAW

In conclusion, the appeal from the building permits is untimely and there is no statutory basis for an appeal from the issuance of a sediment control permit. For the foregoing reasons, these appeals are dismissed.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L Barren, Wendell M.

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[36] Indeed, it is not at all clear that the County issued the stop work order because Mr. Evans failed to obtain a sediment control permit before he obtained his building permits. At oral argument, the County suggested that it initially appeared that Mr. Evans' proposed land disturbance did not meet the threshold for requiring a sediment control permit and that the County later required one when circumstances changes on site.

Holloway and Allison Ishihara Fultz, Chair in agreement, the Board adopted the following resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

/s/
Allison Ishihara Fultz
Chair, Montgomery County
Board of Appeals

Entered in the Opinion Book of the Board of Appeals for Montgomery County, Maryland this 29th day of March, 2005.

/s/
Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

MONTGOMERY COUNTY BOARD OF APPEALS

MONTGOMERY COUNTY, MARYLAND

	: Case No.
PETITION OF JUDITH AND	: A-6020
THOMAS BURRUSS	:
PETITION OF ALAN GAUNOUX	: Case No.
	: A-6029

A hearing in the above-entitled matter was held on Wednesday, November 10, 2004, commencing at 2:03 p.m., in the Second Floor Rita Davidson Memorial Hearing Room, at the Stella B. Werner Council Office Building, 100 Maryland Avenue, Rockville, Maryland 20850, before:

Board Members

Allison I. Fultz, Board Chairman
Donna L. Barron, Vice Chairman
Angelo M. Caputo
Louise L. Mayer
Wendell Holloway

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Staff

Katherine Freeman, Executive Secretary
Hermene Jones, Administrative Specialist/clerk to the Board
Thomas Carbo, Esquire, Assistant County General

MS. FULTZ: So, I understand you to echo Mr. Spicer's arguments on the jurisdictional issue and then with regard to any constitutional considerations, what I hear you saying is that this Board is a creature of statue and can only act in accordance with statute. And we haven't been given leave to take on those due process issues outside of the due process requirements that we are required to apply. We simply can't. Again, it's a question of jurisdiction.

ME. VAN GRACK: Absolutely. Yes that's accurate.

MS. FULTZ: Any questions? Anything further, van Grack?

ME. VAN GRACK: No.

MS. FULTZ: Okay. Mr. Parsons.

ME. PARSONS: Thank you. Mr. Van Grack is correct that there is a case proceeding in the Circuit Court. What Mr. Van Grack did not say to you is they have moved in that case to dismiss the case based upon my client's failure to exhaust their administrative remedies before this Board. That is why we are here. We are here before you to exhaust our administrative remedies. And we believe you do have jurisdiction to hear this appeal. They say you don't. That needs to be stated.

And I want to clarify also Mr. Van Grack on behalf of his clients did move to extend the time to respond. That motion was granted. He has until

November 24th to file a response to our complaint in that case. But we are before you to exhaust our administrative remedies. That's what we're here for. Now, we have to remember this case involves four 190 foot radio towers that have now been constructed on this property in Poolesville, 15110 Sugar Lane Road in Poolesville. This is in the ag reserve zone. It's the RDT Zone. And I represent Thomas and Judith Burruss who are here and Mr. Alan Gaunoux who is also here today. The Burruss' live right next door to this property and Mr. Ganoux lives right across Sugar Lane Road from the property, right across the street.

It's our position in this case that in both of the appeals, that the radio towers are not permissible as accessory uses or as accessory structures. That's the only way they're allowed if they're accessory uses or accessory structures. This is a permissive zoning ordinance. It's not permitted, it's not allowed. The only way the County can justify these uses is if they are accessory uses or accessory structures. Why aren't they allowed? Because to be an accessory use or accessory structure, it has to be customarily incidental to the primary use. The primary use here is agriculture. Can you say that four 190 foot radio towers are customarily incidental or subordinate to an agricultural use? Of course you can't. It's wrong.

We've also found out that there's no record plat for this property and as of yesterday, I have here and I would like to submit into the record an e-mail from the County's own Chairman of the Agricultural Preservation Advisory Board as of yesterday. I'd like to submit this is the record if I may.

MS. FULTZ: Okay. Mr Spicer, any objections?

ME. SPICER: Well, yes. We're here on motions. And so far I'm only hearing argument about merits. Now, this is all premature. I haven't heard one word addressing the substance of the Motions to Dismiss and why this Board should even listen to arguments on the merits.

MS. FULTZ: Mr. Van Grack.

ME. VAN GRACK: I concur.

MS. FULTZ: I'll sustain the objection because we really haven't gotten to the merits yet.

ME. PARSONS: Okay. Well I just want to make a proffer then. If I may preserve the record, that this e-mail suggests that the County erred because they did not require this property to go to subdivision before issuing the building permits as required by Chapter 50, Section 20 of the County Code. Now, we are requesting in this case that the Board require the property owner to obtain a special exception for these radio towers and we have raised issues as to the height limitations. Now, we are here today to oppose the motions to dismiss that have been filed by both the structure associated swimming pool, not a residentially zoned land, not increasing the footprint or height of any existing structure. And he was required to conspicuously post the notice on his property. We have four 190 foot radio towers across the street and no conspicuous note of posting was required? How does that make sense? And

think about the County position here. My clients are not entitled to any notice. They didn't have any notice. The County says they're not entitled to it, but if they don't appeal within 30 days something they have no reason to know about, then the Board can't hear the case? How does that make sense?

If you find that you don't have jurisdiction to hear this appeal, then we go to Circuit Court. We have no remedy before you. And we're not required to exhaust our administrative remedies if there's no remedies before this Board. Mr. Van Grack has made that argument in Circuit Court. We think that holding my clients to the 30 day appeal period under these circumstances is fundamentally unfair and violates their rights to due process. There is a deprivation of a property right. If you look at these cases, it talks about adversely affecting the use and enjoyment of their property. And that's what we have here. You've got four 190 foot radio towers going up next door to you or across the street from you. Okay. I think you can take administrative notice of what that's going to do to your property, use and enjoyment of your own property if that happens.

We're here today. We could present testimony and we'd like to present testimony on that issue to preserve the record. But you don't even have to go there.

MS. FULTZ: Well, I do want to ask you one question with regard to that. And that is if there is not an administrative remedy before this Board with regard to the standards you just cited in terms of the impact upon reasonable use and enjoyment of the

land, does that not still enable your client to pursue an action in a court of law --

ME. PARSONS: Legally it does.

MS. FULTZ: -- in those causes of action –

ME. PARSONS: Legally it does.

MS. FULTZ: -- independent of what this Board is able to do?

ME. PARSONS: Yes, but as I said, we don't think this Board will even have to go there. Because when the sediment control permit was issued that reopened the door. Okay. And the reason why, if you look at Section 8-26(I)(1) of the Code, it says sediment control permit must be issued before the building permit. We appealed within 30 days of the issuance of the sediment control permit. As a matter of law, we have to be timely. The code requires it. That's why they issued the stop work order. The building permit as originally issued was either invalid and had no force and*of the building permit has to be timely. By virtue of expressed language contained in the County Code that is in Chapter 8.

Anyway, going back to the issue of what's going on in the Circuit Court, we filed the action in Circuit Court because that was our only chance to stop the construction of the towers before they went up. Our motion for the preliminary injunction was denied by Judge Baird on the basis that he found that if we prevailed in the end, the towers could come down. And that's why there was

no irreparable harm. That was the basis for his finding. So that case will go forward and it's in the discovery phase. But, again, Mr. Van Grack on behalf of the Evans is arguing that case that we have to exhaust our administrative remedies here. And we think you do have jurisdiction. We think you are the appropriate body to make this decision as to whether or not these towers qualify as an accessory use. We think you should decide that, not the Circuit Court. It's an issue under the Zoning Ordinance. And there is a basis for you to have jurisdiction over that.

Well, at this point, we would like to introduce testimony on the issue of the notice and on the issue of the depravation of property.

MS. FULTZ: The board isn't going to take any testimony on the merits, frankly, until we've decided the procedural and jurisdictional issues of the motion. So, should we go forward, that would certainly be part of what we would take up in the hearing.

ME. PARSONS: I'm not talking about the merits. I'm talking about the issue of, the fact that they did not notice. And we have a stipulation here, I don't know, that my clients, in fact, did not have notice of the issuance of this permit until August 5th, 2004. I think we --

MS. FULTZ: I'm not hearing the County argue that there was notice Because the County's arguing that there was no notice requirement.

ME. SPICER: I'm just saying it doesn't really matter.

ME. PARSONS: I think we need to --

ME. SPICER: I have no way of knowing.

ME. PARSONS: -- provide testimony on that. I will make a proffer and I need to hear from the Board as to whether or not I'll be permitted. What I would proffer to you is that we would introduce testimony to show that there was no notice provided. Actually they received no notice of this until August 5th, 2004 and on the issue of the deprivation of their property interests. That these towers are adversely affecting their use and enjoyment of their property and negatively affecting the value of their property.

ME. SPICER: That's not an issue before this Board -

ME. PARSON: -- due process.

ME. SPICER: -- the building permit. Okay. There is no constitutional right to be able to file an appeal from the issuance of a building permit.

MS. FULTZ: Yeah, Mr. Parsons, that is the line I was trying to draw earlier to stay within the purview of this Board's jurisdiction that that was the that if there are legal property based rights which are being implicated, that certainly goes far beyond what this Board is able to adjudicate.

ME. PARSONS: Well, I think I've made my proffer. If the Board is going to prohibit us from producing that testimony, I'll accept that. I think I've

made the proffer into the record and that's all I needed to do. Is that the Board's position?

MS. FULTZ: That would be the Board's position.

ME. PARSON: Okay. So, I guess in closing then, I think what we're dealing with here is both the county and Mr. And Mrs. Evans they don't want you to reach this issue. They're desperately trying to avoid this Board deciding the question of whether or not these towers qualify as an accessory use. And they don't. You can't say that four 190 foot radio towers are customarily incidental to an*